



# INDIAN LAW REPORTS, CALCUTTA SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT CALCUTTA  
AND BY THE JUDICIAL COMMITTEE OF THE PRIVY  
COUNCIL ON APPEAL FROM THAT COURT AND  
FROM ALL OTHER COURTS IN BRITISH  
INDIA [EXCEPT THE COURT OF THE  
JUDICIAL COMMISSIONER OF  
POWINDH] NOT SUBJECT TO  
ANY HIGH COURT.

**Editor**

... B. D. BOSE, *Barrister-at-Law (offg.).*

## REPORTERS :

**PRIVY COUNCIL** ...

... J. V. WOODMAN, *Barrister-at-Law.*

**HIGH COURT, CALCUTTA**

... {  
J. CAMELL, *Barrister-at-Law.*  
E. H. MONNIER, *Barrister-at-Law.*  
S. MITRA, *Vakil, High Court.*  
C. E. BAGRAM, *Barrister-at-Law.*  
S. KHUDA BUKHSH, *Barrister-at-Law.*  
G. SIRCAR, *Vakil, High Court.*  
O. MOSES, *Barrister-at-Law (offg.).*  
H. R. PANCKRIDGE, *Barrister-at-Law.*

---

**VOL. XL.**

JANUARY TO DECEMBER 1913.

---

Published under the Authority of the Governor-General in Council

BY THE BENGAL SECRETARIAT FINANCIAL DEPARTMENT,  
BOOK DEPOT BRANCH,





# THE HIGH COURT,

1913.

---

## Chief Justice :

THE HON'BLE SIR LAWRENCE HUGH JENKINS, KT., K.C.I.E.

## Puisne Judges :

THE HON'BLE SIR RICHARD HARRINGTON, BART. (*retired*  
*15th Nov. 1913*).

„ „ CECIL M. W. BRETT, T., C.I.E. (*retired*  
*11th Jan. 1913*).

„ „ HARRY L. STEPHEN, KT.

„ J. G. WOODROFFE.

„ SIR ASUTOSH MOOKERJEE, KT., C.S.I.

„ H. HOLMWOOD.

„ C. W. CHITTY.

„ E. E. FLETCHER.

„ S. SHARFUDDIN.

„ H. R. H. COXE.

„ SIR HERBERT W. C. CARNDUFF, KT., C.I.E.

„ D. CHATTERJEE.

„ N. R. CHATTERJEE.

„ W. TEUNON.

„ T. W. RICHARDSON.

„ A. CHAUDHURI.

„ S. HASAN IMAM (*Additional*).

„ C. P. BEACHCROFT (*Additional*).

„ E. P. CHAPMAN (*Additional*).

„ B. K. MULICK (*Additional*).

„ B. B. NEWBOULD (*offg.*).

„ H. N. RAY (*offg.*).

„ H. WALMSLEY (*offg.*).

---

THE HON'BLE G. H. B. KENRICK, K.C., *Advocate-General*.

„ B. C. MITTER, *Standing Counsel*.

## CORRIGENDA.

---

- Page 15, line 21, *for* "Tarquand" *read* "Turquand".  
Page 23, line 3 from the bottom, *for* "and" *read* "an".  
Page 274, line 15 (head note), *for* "named" *read* "named)".  
Page 274, line 18 (head note), *for* idol: *read* idol?".  
Page 278, line 16, *for* "Rampaini" *read* "Rampini".  
Page 379, line 15 (head note), *for* "of" *read* "or".  
Page 384, line 8, *for* "in the suit" *read* "in suit".  
Page 397, line 14, *for* "nor" *read* "not".  
Page 605, line 13, *omit* comma *after* "question".  
Page 605, line 14, *for* "which" *read* "in which".  
Page 605, line 14, *omit* comma *after* "demurrer".  
Page 638, line 21, *for* "partition" *read* "portion".  
Page 837, line 3 (head note), *for* "or" *read* "for".  
Page 977, line 25, *for* "Limitations" *read* "Limitation".



# TABLE OF CASES REPORTED

VOL. XL.

—: o :—

## PRIVY COUNCIL.

	PAGE.	
Azima Bibi <i>v.</i> Shamalanand	... 378	Kirpal Singh <i>v.</i> Balwant
Baijnath Ram Goenka <i>v.</i> Nand Kumar	...	Krishna Pershad Singh <i>v.</i>
Singh	... 552	Moosa Goolam Ariff <i>v.</i> Eb
Phawani Kuwar <i>v.</i> Mathura Prasad Singh	89	Ariff
Chiman Lal <i>v.</i> Hari Chand	... 879	Ramkishore Kedarnath
Court of Wards <i>v.</i> Ilahi Bakhsh	... 297	Ramrachhpal
Gulab Singh <i>v.</i> Gokuldas	... 784	Rangoon Botatoung Co.,
Kanhaya Lal <i>v.</i> National Bank of India,	...	Collector, Rangoon
Ld.	... 598	Secretary of State for Indi
Kidar Nath <i>v.</i> Mathu Mal	... 555	Tripurari Pal <i>v.</i> Jagat Tar

## FULL BENCH.

Debi Prosad Chowdhury <i>v.</i> Golap Bhagat	721	Munshi Miser <i>v.</i> Bhimraj
Emperor <i>v.</i> Har Prasad Das	... 477	Shambhu Nath Singh <i>v.</i>
Hiralal Singha <i>v.</i> Tripura Charan Ray	... 650	Singh

## ORIGINAL CIVIL.

Administrator-General of Bengal <i>v.</i>		Oriental Government Secur
Hughes	... 192	ance Co., Ld. <i>v.</i> Orien
Grey <i>v.</i> Lamond Walker	... 523	Co., Ld.
Jagannath & Co. <i>v.</i> Cresswell and Others	814	Prosad Chunder De <i>v.</i> C
Jogemaya Dasee <i>v.</i> Akhoy Coomar Das	... 140	Calcutta
Kesri Chand <i>v.</i> National Jute Mills Co.	... 119	Sarat Chandra Ghose <i>v.</i> P
Maheshpur Coal Co., Ld. <i>v.</i> Jatindra Nath	...	Ghose
Gupta	... 386	Thaddeus <i>v.</i> Janaki Nath S
Nanda Lal Roy <i>v.</i> Dharendra Nath	...	
Chakravarti	... 710	

## APPEALS FROM ORIGINAL CIVIL

Baijnath <i>v.</i> Ahmed Musaji Saleji	... 219	Rodricks <i>v.</i> Secretary of St
Joshua <i>v.</i> Arakie	... 266	Weston <i>v.</i> Peary Mohan De
Provas Chandra Roy, <i>In the matter of</i>	... 588	

# TABLE OF CASES REPORTED.

## APPELLATE CIVIL.

	PAGE.		PAGE.
Amrita Lal Bagchi v. Jogendra Lal Chowdhury ...	187	Kumel Dewa v. Prasanna Kumar Roy ...	45
Baburam Bag v. Madhab Chandra Pollay ...	565	Lakshmi Bibi Kujrani v. Atal Bihari Haldar ...	534
Bhima Rout v. Dasarthi Das ...	323	Madanmohan Nath Sahi Deo v. Protap Uday Nath Sahi Deo ...	623
Bhola Nath Roy v. Secretary of State for India ...	503	Majibbar Rahman v. Muktashed Hossein ...	113
Bhupendra Nath Bose v. Bansi Tanti ...	870	Makbul Ali v. Ali Ahmad ...	514
Bidyaprasad Narain Singh v. Ashrafi Singh ...	862	Maumohan Dutt v. Collector of Chittagong ...	64
Bisseswar Sonamut v. Jasoda Lal Chowdhury ...	704	Mathura Prasad v. Tota Singh ...	806
Biswanath Pershad Mahta v. Jagdip Narain Singh ...	342	Midnapore Zemindari Co., Ltd. v. Mukhtakoshi Dassi ...	402
Chandra Madhab Barua v. Nabin Chandra Barua ...	108	Naba Kishore Mandal v. Atul Chandra Chatterji ...	150
Chatrapat Singh Dugar v. Kharag Singh Lachmiram ...	685	Panchuram Tekadar v. Kinoo Haldar ...	56
Cheodditti v. Tulsi Singh ...	428	Parbati Debi v. Mathura Nath Banerjee ...	29
Godhanram v. Jaharmull Paglia ...	335	Prasanna Kumar Mookerjee v. Srikanta Rout ...	173
Gour Chandra Das v. Sarat Sundari Dassi ...	50	Raj Krishna Dey v. Bipin Behary Dey ...	245
Guru Charan Hajam v. Suklal Hajam ...	858	Raj Krishna Dey v. Bipin Behary Dey ...	251
Haribar Guru v. Ananda Mahanty ...	365	Ramprasanna Nandi Chowdhuri v. Secretary of State for India ...	895
Harihar Prasad Singh v. Syam Lal Singh ...	615	Secretary of State for India v. Purnendu Narayan Roy ...	123
Harish Chandra Roy v. Atir Mahmud ...	545	Shashi Bhushan Lahiri v. Rajendra Nath Joardar ...	82
Indra Chandra Mukherjee v. Srish Chandra Banerjee ...	537	Srish Chandra Pal Chowdhury v. Triguna Prasad Pal Chowdhury ...	541
Kailash Chandra Nag v. Secretary of State for India ...	452		
Kulada Prasad Pandey v. Haripada Chatterjee ...	407		

## CIVIL RULES.

Anand Mahanti v. Ganesh Maheswar ...	678	Kartik Chandra Ojha v. Gora Chand Mahto ...	518
Harai Saba v. Faizur Rahman ...	619	Nanda Kishore Singh v. Ram Golam Sahu ...	955
Hari Mandal v. Keshab Chandra Mana ...	37	Vismadev Das v. Sita Nath Roy ...	259
India General Steam Navigation Co. v. Bhagwan Chandra Pal ...	716		

## ORIGINAL CRIMINAL.

Emperor v. Jiban Kristo Bagchi ...	318
------------------------------------	-----

## APPELLATE CRIMINAL.

Anath Nath Dey v. Emperor ...	281	Nazimuddin v. Emperor ...	163
Dilan Singh v. Emperor ...	360	Pulin Tanti v. Emperor ...	873
Nawab Hawladar v. Emperor ...	891	Samaruddi v. Emperor ...	367

# TABLE OF CASES REPORTED.

## CRIMINAL REFERENCE.

Emperor v. Harkumar Barman Roy ... ..

## CRIMINAL REVISION.

Abdullah Mandal v. Emperor	...	854	Kari Singh v. Emperor	...	...
Asgar Ali Biswas v. Emperor	...	846	Kari Singh v. Emperor	...	441 (v)
Aziz Sheikh v. Emperor	...	631	Leakat Hossein v. Emperor	...	...
Bangali Shah v. Emperor	...	702	Maniruddin Sircar v. Abdul Rauf	...	...
Basanta Kumari Dasi v Mahesh Chandra	...	...	Phaniudra Singh v. Emperor	...	...
Laha	...	982	Pochai Meteh v Emperor	...	...
Bhim Lal Sah v. Emperor	...	444	Ram Angutha Singh v. Emperor	...	...
Durga Prosad Pathak v. Lachman Bania	584	...	Sheolalak Rai v. Bhagwat Pandey	...	...
Emperor v. Sheikh Idoo	...	71	Shewdhar Sukul v. Emperor	...	...
Fidoi Hossein v. Emperor	...	376	Sita Ahir v. Emperor	...	...
Ganpat Rai v. Emperor	...	356	Subed Ali v. Emperor	...	...
Jhulan Sain v. Emperor	...	548			

## INSOLVENCY JURISDICTION.

Jewandas Jhawar, *In re* ... ..

## MATRIMONIAL JURISDICTION.

Giordano v. Giordano ... ..

## TESTAMENTARY JURISDICTION.

William Rennie, *In the goods of* ... ..





# TABLE OF CASES CITED.

## A

	PAGE.
Aba v. Dhonda Bai, I. L. R. 19 Bom. 276 ...	641
Abdool Bari v. Ramdass Coondeo, I. L. R. 4 Calc. 607 ...	99
Abdul Hakim v. Tej Chaudar Mukarji, I. L. R. 3 All. 815 ...	436
Abdul Karim v. Manji Hansraj, I. L. R. 1 Bom. 295 ...	707
Abdul Khalek v. King-Emperor, 17 C. W. N. 72, not followed ...	631
Abdul Rahman v. Emperor, 7 C. L. J. 371, referred to ...	361
Abdul Razah v. Basiruddin Ahmed, 14 C. W. N. 586 ...	681
Abdulla v. Ram Lal, I. L. R. 34 All. 129 ...	740
Abdullah Khan v. Emperor, I. L. R. 37 Calc. 52 ...	494
Abhiram Goswami v. Shyama Charan Nandi, I. L. R. 36 Calc. 1003 ...	896
Abraham v. Abraham, 9 Moo. I. A. 195 ...	411
Accident Insurance Company Ltd. v. Accident, Disease, and General Insurance Corporation Ltd., 54 L. J. Ch. 104, referred to ...	571
Achhan Kunwar's Case, I. L. R. 21 All. 71 ; L. R. 25 I. A. 183 ...	744
Adhur Chunder Banerjee v. Aghore Nath Aroo, 2 C. W. N. 589, relied on ...	95
Advyapa v. Rudrava, I. L. R. 4 Bom. 104, approved ...	650
Agund Rasee v. Rughoonath Sahye, 6 Mac. Sel. Rep. 37 ; 7 i. D. (O. S.) 693 ...	741
Ahadulla v. Gagan, 2 C. L. J. 10 ...	35
Allen v. Anthony, 1 Mer. 282 ; 15 R. R., 113 ...	567
Aman Ali v. Mir Hossain, 10 C. L. J. 605 ...	182
Amarnath Sah v. Achan Kuar, I. L. R. 14 All. 420 ; L. R. 19 I. A. 196 ...	767
Ambler's Trust, <i>In re</i> , 59 L. T. N. S. 210, referred to ...	251
Amlook Chand Parrack v. Sarat Chunder Mukerjee, I. L. R. 38 Calc. 913 ...	707
Ancketill v. Baylis, 10 Q. B. D. 577 ...	116
Annada Kumar Roy v. Indra Blusan Mukhopadhyaya, 12 C. W. N. 49 ...	736
Annoda Prosad Chatterjee v. Kali Krishna Chatterjee, I. L. R. 24 Calc. 95 followed ...	50
Annoda Prosad Ghose v. Rajendra Kumar Ghose, I. L. R. 29 Calc. 223 ...	94
Appovier v. Rama Subba Aiyan, 11 Moo. I. A. 75 ...	784
Arayil Kali Anna v. Palappakkara Manakal, 20 Mad. L. J. 347...	707
Arbitration between Knight and the Tabernacle Permanent Building Society, [1892] 2 Q. B. 613 ...	25
Ashruf Ali v. Emperor, I. L. R. 36 Calc. 1016 ...	992
Ashton v. Madhabmani Dasi, 14. C. W. N. 560 ; 11 C. L. J. 489...	47
Attorney-General v. Boulthec, 2 Ves. Jun. 380 ...	201
Attorney-General v. Sillem, 10 H. L. 706 ; 11 E. R. 1220 ...	706

	PAGE.
Atul Chandra Mukerjee v. Shoshee Blusan Mukerjee, 6. C. W. N. 215 ...	386
Augada Ram Shaha v. Nema Chaud Shaha, I. L. R. 23 Calc. 867, followed ...	433
Ayyodorai Pillai v. Solai Ammal, I. L. R. 24 Mad. 405 ...	735

## B

Bache v. Billingham, [1894] 1 Q. B. 107 ...	228
Badaricharya v. Ram Chandra Gopal Savant, I. L. R. 19 Bom. 113	553
Bahadur v. Eradatullah Mallick, I. L. R. 37 Calc. 642 ...	492
Bahadur Singh v. Desraj, (1901) Punjab Rec. No. 53 ...	291
Bahadur Singh v. Mohar Singh, I. L. R. 24 All. 94... ..	743
Bai Chadunbai v. Dady Nusserwanji Dady, I. L. R. 26 Bom. 632, referred to ...	232
Baidya Nath De Sarkar v. Him, I. L. R. 25 Calc. 917 ...	35
Baidya Nath Mondol v. Sudharam Misri, 8 C. W. N. 751 ...	36
Baidya Nath Singh v. Muspratt, I. L. R. 14 Calc. 141, approved ...	445
Bajrang Singh v. Manokarnika Bakhsh Singh, I. L. R. 30 All. 1 ; L. R. 35 I. A. 1., referred to ...	721
Bakhtawar v. Bhagwana, I. L. R. 32 All. 176 ...	739
Bal Gangadhar Tilak v. Sakwarbai, I. L. R. 26 Bom. 792, followed	50
Bal Gangadhar Tilak, <i>In re</i> , I. L. R. 26 Bom. 785 ...	482
Bala Bin Keshav Bava v. Maharu, I. L. R. 20 Bom. 788 ...	459
Balabux v. Rukhmabai, I. L. R. 30 Calc. 725, distinguished	408
Balkishen Das v. Ram Narain Sahu, I. L. R. 30 Calc. 738, distinguished ...	408, 967
Balwant Singh v. Umed Singh, I. L. R. 18 All. 203 ...	425
Banga Hadua v. King-Emperor, 11 C. L. J. 270, distinguished	368
Bank of Bombay v. Suleman Somji, I. L. R. 32 Bom. 466, referred to ...	588
Bank of England v. Vagliano, [1891] A. C. 107, followed	434
Bankruptcy Notice, <i>In re</i> , [1907] 1 K. B. 478, referred to	219
Baperam Surma v. Gouri Nath Dutt, I. L. R. 20 Calc. 349 ...	492
Barber v. Lesiter, 7 C. B. (N. S.) 175 ...	910
Barkat-un-nissa v. Abdul Aziz, I. L. R. 22 All. 214, distinguished	862
Barned's Banking Company. Peels case, <i>In re</i> , L. R. 2 Ch. App. 674, followed ...	2
Barnhart v. Greenshields, 9 Moo. P. C. 18 ; 14 E. R. 204 ...	567
Baroda Charan Dutt v. Hemlata Dassi, 13 C. W. N. 242, commented on ...	870
Baroda Prosad Roy Chowdhry v. Corporation of Calcutta, 13 C. L. J. 611 ...	841
Baroness Wenlock v. River Dee Company, L. R. 38 Ch. D. 534 ...	14
Basanta Kumar Mitter v. Kusum Kumar Mitter, 4 C. W. N. 767, followed ...	386
Begu Singh v. Emperor, I. L. R. 34 Calc. 551 ...	448, 497
Behari Lal v. Madho Lal Abir Gayawal, I. L. R. 19 Calc. 236 ; L. R. 19 I. A. 30 ...	724
Bejoy Madhub Chowdhury v. Chandra Nath Chuckerbutty, 14 C. W. N. 80, distinguished ...	105
Bepin Behari Kundu v. Durga Charan Banerjee, I. L. R. 35 Calc. 1086 ...	736
Bhagabat Prasad Singh v. King-Emperor, 14 C. L. J. 120 ...	497

Bhagbut Pershad Singh v. Girja Koer, I. L. R. 15 Calc. 717 ; L. R. 15 I. A. 99	291, 345
Bhagwat Dayal Singh v. Debi Dayal Sahu, I. L. R. 35 Calc. 420 ; L. R. 35 I. A. 48	768
Bhikumber Singh v. Becharam Sircar, I. L. R. 15 Calc. 264, distinguished	423, 441
Bholanath Roy v. Rakhal Dass Mukherji, I. L. R. 11 Calc. 65, referred to	82
Bholaram Choudhury v. Corporation of Calcutta, I. L. R. 36 Calc. 671	841
Bholaram Chowdhury v. Administrator-General, 8 C. W. N. 913	506
Bhugwandeon v. Myna Bae, 11 Moo. I. A. 487 ; 9 W. R. (P. C.) 23	768
Bhup Kunwar, <i>In the matter of the Petition of</i> , I. L. R. 26 All. 249	481
Bhupendra Kumar Chakrabarti v. Purna Chandra Bose, 13 C. L. J. 132, distinguished	56
Bhutnath Mandal v. Secretary of State for India, 10 C. W. N. 1085, approved	650
Bhyrub Chunder Bundopadhyaya v. Sondamini Deb, I. L. R. 2 Calc. 141, relied on	95
Bibijan Bibi v. Sachi Bewa, I. L. R. 31 Calc. 863	95
Bidhoo Bhusan Palit v. Beny Madhab Mazumdar, 8 C. W. N. 244, overruled	458
Bihari Lal Paul v. Gopal Lal Seal, 1 C. W. N. 695	620
Bindrabun Chund Rai v. Bishun Chund Rai, 1 Mac. Sel. Rep. 180 ; 7 I. D. (O. S.) 134	769
Bipradas Dey v. Secretary of State for India, I. L. R. 14 Calc. 262n.	311
Bishan Singh v. Amrit Saria, 7 Cr. L. J. 28	481
Bishendut Tewari v. Nandan Pershad Dubay, 12 C. W. N. 25	261
Bisheshur v. Mata Gholam, 2 All. H. C. 300, approved	650
Black v. Lovering & Co., 35 W. R. 232	388
Boelm v. Goodall, [1911] 1 Ch. 155, referred to	679
Boidya Nath Adya v. Makhan Lal Adya, I. L. R. 17 Calc. 680, referred to	245
Bombay Burmah Trading Corporation Ltd. v. Dorabji Cursetji Shroff, I. L. R. 27 Bom. 415, referred to	685
Bombay Co. Ltd. v. The National Jute Mills Co. Ltd., I. L. R. 39 Calc. 669	228
Bowen, <i>In re</i> , Lloyd Phillips v. Davis, [1893] 2 Ch. 491, distinguished	193, 203
Brij Coomaree v. Ramrick Dass, 5 C. W. N. 781, referred to	955
Brij Indar Bahadur Singh v. Rani Janki Koer, L. R. 5 I. A. 1 ; 1 C. L. R. 318	662
Brijraj Singh v. Sheodan Singh, I. L. R. 35 All. 337	975
Brindabun Chund Rai v. Bishun Chund Rai, 4 Mac. Sel. Rep. 180 ; 7 I. D. (O. S.) 134	741
Bristowe v. Whitmore, 9 H. L. C. 391, approved	335
British American Tobacco Company v. Mahboob Buksh, I. L. R. 38 Calc. 110, distinguished	814
Brito v. The Secretary of State for India in Council, I. L. R. 6 Bom. 251	315
Burgess v. Langley, M. & G. 722, referred to	693
Burgess v. Morton, [1896] A. C. 136	25

## C

	PAGE.
Carr v. The London and North-Western Railway Company, L. R. 10 C. P. 307	181
Chairman of Giridih Municipality v. Suresh Chandra Mazumdar, 12 C. W. N. 709	841
Chaitan Patgosi Mahapatra v. Kunja Behari Patnaik, I. L. R. 38 Calc. 832	518
Chajmal Das v. Jagadamba Prasad, I. L. R. 11 All. 408	707
Chalmers, <i>Ex parte</i> , L. R. 8 Ch. App. 289, followed	523, 532
Chamberlayne v. Brockett, L. R. 8 Ch. App. 206, distinguished	193
Chandranath Biswas v. Biswanath Biswas, 6 B. L. R. 492n, followed	140
Charu Surnokar v. Dokauri Chunder Thakoor, I. L. R. 8 Calc. 956	460
Chatoo Kurmi v. Rajaram Tewari, 11 C. L. J. 124	82, 634
Chatrapat Singh v. Grindra Chunder Roy, I. L. R. 6 Calc. 389	98
Chaudhari Mahomed Izharul Huq v. Queen-Empress, I. L. R. 20 Calc. 349	484
Chennanagoud, <i>In re</i> , I. L. R. 26 Mad. 139	479
Chidambaram Chetty v. Karuppan Chetty, I. L. R. 35 Mad. 678	707
Chiman Lal v. Hari Chand, I. L. R. 40 Calc. 879	975
Chinna Rangaiyengar v. Subbraya Mudali, 3 Mad. H. C. R. 334	334
Choutnull Doogur v. The Rivers Steam Navigation Co., I. L. R. 24 Calc. 786, followed	716
Chowdhry Goordutt Singh v. Gopal Dass, 1 Agra H. C. R. 33	436
Christmas v. Oliver, 10 B. & C. 181	184
Christ's Hospital v. Grainger, 1 Mac. & G. 460, distinguished	193
Clarke v. Adie, L. R. 2 A. C. 423	826
Clarke v. Brojendra Kishore Roy Chowdhury, I. L. R. 36 Calc. 433	924
Cleaver, F. J., <i>In the Estate of</i> , [1905] P. 319	864
Cobbett v. Hudson, 1 E. & B. 11, referred to	900
Collector of Furreedpore v. Gooroo Dass Roy, 11 W. R. 425	454
Collector of Masulipatam v. Cavalry Vencata Narrainapah, 8 Moo. I. A. 529; 2 W. R. (P. C.) 61	726, 768
Collins v. Blantern, 1 Smith L. Cases, 11 Edition, 369	118
Collychund Dutt v. Moore, Fulton 73; 1 I. D. (O. S.) 687	771
Colonial Life Assurance Company v. Home and Colonial Assurance Company Ltd., 33 Beav. 548	575
Colonial Sugar Refining Co. Ltd. v. Irving, [1905] A. C. 369	706
Condit v. Bigelow, 64 N. J. Eq. 504; 54 Atlantic 160	186
Corea v. Peiris, [1909] A. C. 549; 14 C. W. N. 86, referred to	900
Counsel, <i>In the matter of certain</i> , 4th August 1908 (unreported) approved	901
Country Council of Kent and Councils of Dover and Sandwich, [1891] 1 Q. B. 725	25
Craigish, <i>In re</i> , [1892] 3 Ch. 180	217
Curry v. Walter, 1 Esp. 456, distinguished	900

## D

Dagdu v. Pancham Singh Gangaram, I. L. R. 17 Bom. 375, relied on	95
Dakhineswar Misra v. Haris Chundra Chatterji, 10 C. L. J. 450	480

# TABLE OF CASES CITED.

v

	PAGE.
Damodar Gordhan v. Deoram Kanji, I. L. R. 1 Bom. 367	126
Daniels v. Davison, 16 Ves. 249 ; 17 Ves. 433 ; 10 R. R. 171	567
Darbari Mandar v. Jagoo Lal, I. L. R. 22 Calc. 573, referred to	584
Dasharathi Kundu v. Bipin Behary Kundu, I. L. R. 32 Calc. 261, referred to	82
Davis v. Bromley Corporation, [1908] 1 K. B. 170, followed	837
Dawkins v. Rokeby, L. R. 8 Q. B. 255	435
Dayaram Jagjivan v. Gordhandas Dayaram, I. L. R. 31 Bom. 73, referred to	245
Deane v. Packwood, 4 Dowl. & L. 395n, referred to	900
Debi Das Chowdhuri v. Bipro Charan Ghosal, I. L. R. 22 Calc. 641	94
Deendyal Lal v. Jugdeep Narain Singh, I. L. R. 3 Calc. 198 ; L. R. 4 I. A. 247	345 ; 977
Devi Ditta v. Saudagar Singh, (1900) Punjab Rec. No 65	289
Dharam Chand Lall v. Queen-Empress, I. L. R. 22 Calc. 596, distinguished	849
Dharampuram v. Virapandiyam, I. L. R. 22 Mad. 302, followed	545
Dharmadas Kamar v. Sagore Santra, 11 C. W. N. 119	425
Dinendra Narain Roy v. Tituram Mukerjee, I. L. R. 30 Calc. 801	67
Doolee Chund v. Mussamut Omda Begum, 24 W. R. 263	184
Doollub Sircar v. Kristo Coomar Bukshee, 12 W. R. 303	184
Doss v. Secretary of State for India in Council, L. R. 19 Eq. 509	315
Doya Narain Tewary v. The Secretary of State for India in Council, I. L. R. 14 Calc. 256, followed	308
Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 E. & L. 418	696
Duli Chand v. Ram Kishen Singh, I. L. R. 7 Calc. 648 ; L. R. 8 I. A. 93	599
Dunne v. Kumar Chandra Kisore, I. L. R. 30 Calc. 593	153
Durga Prasad Singh v. Ram Doyal Chaudhuri, I. L. R. 38 Calc. 154, followed	899
Dwarkanath Chuckerbutty v. Dhun Monee Chowdhraim, 15 W. R. 524, referred to	623
Dwarka Nath Mondul v. Beni Madhub Banerjee, I. L. R. 28 Calc. 652	73
Dwarka Nath Sen v. Peari Mohan Sen, 1 C. W. N. 694	462

## E

Emerson v. Sansom, 41 California 552	185
Emmanuel <i>Ex parte</i> , 17 Ch. D. 35, followed	679
Emperor v. Arjan Pramanik, I. L. R. 31 Calc. 664	495
Emperor v. Ganga Prasad, I. L. R. 29 All. 685	435
Emperor v. Gopal Barik, I. L. R. 34 Calc. 42, considered and approved	477
Emperor v. Tanuk Lal Chowdhuri, unreported, disapproved	445
Eranholi Athan v. King-Emperor, I. L. R. 26 Mad. 98	479
Erava v. Sidramappa, I. L. R. 21 Bom. 424	641
Erichsen v. Last, L. R. 8 Q. B. D. 414	311
Eshan Chunder Sein v. Shaikh Dhonaye, 11 W. R. 61	567
Ezra v. Secretary of State for India, I. L. R. 32 Calc. 605 ; L. R. 32 I. A. 93	23

## F

	PAGE.
Fatima Khatoon <i>v.</i> Mahomed Jan Chowdhry, 12 Moo. I. A. 65 ...	603
Feda Hossein, <i>In the matter of the petition of</i> , I. L. R. 1 Calc. 431 ...	688
Ferasat <i>v.</i> Queen-Empress, I. L. R. 19 Calc. 105, referred to ...	511
Ferrer <i>v.</i> Oven, 7 B. & C. 427 ...	225
Fleuner <i>v.</i> Traveller's Insurance Company, 89 Indiana 164 ...	185
Flower <i>v.</i> Sadler, 10 Q. B. D. 572 ...	115
Francis Ghosal <i>v.</i> Gabri Ghosal, I. L. R. 31 Bom. 25 ...	412
Freeman <i>v.</i> Jeffries, L. R. 4 Exch. 189 ...	601
Freeman <i>v.</i> Thayer, 29 Maine 369 ...	185
Frewin <i>v.</i> Lewis, 4 Mylne & Craig 249 ...	592

## G

Gajju <i>v.</i> King-Emperor, 2 All. L. J. 173, referred to...	955
Gayratulla Sardar <i>v.</i> Girish Chandra Bhaumik, 12 C. W. N. 175, approved ...	806
Gharibullah <i>v.</i> Khalak Singh, I. L. R. 25 All. 407; L. R. 30 I. A. 165, referred to ...	342; 345; 784
Giblan <i>v.</i> National Amalganated Labourer's Union, [1903] 2 K. B. 600, referred to ...	901
Gibson <i>v.</i> East India Company, 5 Bing. N. C. 262 ...	312
Girdharee Lall <i>v.</i> Khantoo Lall, 14 B. L. R. 187; 22 W. R. 56; L. R. 1 I. A. 321 ...	344
Girwardhari <i>v.</i> Jai Narain, I. L. R. 32 All. 645 ...	678
Gobind Krishna Narain <i>v.</i> Abdul Qayyum, I. L. R. 25 All. 546 ...	411
Gobind Krishna Narain <i>v.</i> Khunni Lal, I. L. R. 29 All. 487 ...	411
Gocul Chund Chuckerwarte <i>v.</i> Mussumaut Rajrahee, 2 Mac. Sel : Rep. 213; 6 I. D. (O. S.) 521 ...	741
Gokaldas Gopaldas <i>v.</i> Puranmal Premsukhdas, I. L. R. 10 Calc. 1035; L. R. 11 I. A. 123 ...	98
Gokul Mandar <i>v.</i> Pudmanund Singh, I. L. R. 29 Calc. 707, followed ...	434
Golam Hossein Cassim Ariff <i>v.</i> Fatima Begum, 16 C. W. N. 394, followed ...	140
Golam Mahomed Shaha <i>v.</i> Sharoda Pershad Mullick, 19 W. R. 91 ...	650
Golap Jan <i>v.</i> Bholanath Khettry, I. L. R. 38 Calc. 880, distinguished ...	433
Golap Singh <i>v.</i> Indra Coomar Hazra, 13 C. W. N. 493 ...	59
Gopal Das <i>v.</i> Badri Nath, I. L. R. 27 All. 361 ...	338
Gopal Lal Sahai <i>v.</i> Bahorni, 15 C. L. J. 120, followed ...	240
Government of Bombay <i>v.</i> Dorabji Balabhai, 11 Bom. H. C. 117 ...	707
Govind Chandra Das <i>v.</i> Radha Kristo Das, I. L. R. 31 All. 477 ...	416
Govindchund Bysack <i>v.</i> Cossinaut Bysack, Montr. H. L. C. 477; 1 I. D. (O. S.) 292 ...	742
Grant, <i>In the matter of</i> , 14 W. R. 47, referred to ...	365
Greene <i>v.</i> Delanney, 14 W. R. Cr. 27, followed ...	433
Grimond <i>v.</i> Grimond, [1905] A. C. 124, referred to ...	232
Grover and Baker Sewing Machine Co. <i>v.</i> Millard, 8 Jur. (N. S.) 713 ...	826
Guardian Fire and Life Assurance Company <i>v.</i> Guardian and General Insurance Company Ltd., 50 L. J. Ch. 253, referred to ...	571

# TABLE OF CASES CITED.

vii

	PAGE.
Gulab Koer v. Badshah Bahadur, 10 C. L. J. 420, referred to	512
Gungadeen Misser v. Kheeroo Mundul, 14 B. L. R. 170	94
Gunga Pershad Kur v. Shumbhoonath Burman, 22 W. R. 393	731, 762
Gunnesh Dutt Singh v. Mugneeran Chowdhry, 11 B. L. R. 321, distinguished	...
Gunson v. Simpson, L. R. 5 Eq. 332, referred to	433
Guru Das Kundu Chowdhry v. Kedar Nath Kundu Chowdhry, I. L. R. 38 Calc. 889	251
Gyde. Ward v. Little, <i>In re</i> , 79 L. T. 261	984
	201

## H.

Hafzoonnissa Begum v. Radha Binode Missur, Beng. S. D. A. R. 595	...
Haibat Khan v. Emperor, I. L. R. 33 Calc. 30, distinguished	769
Haidar Ali v. Abru Mia, I. L. R. 32 Calc. 756, referred to	360
Hale v. Cove, 1 Str. 642	433
Hamill v. Murphy, L. R. 12 Ir. 400	696
Hanuman Kamat v. Hanuman Mandur, I. L. R. 19 Calc. 123	184
Hara Charan Mookerjee v. King-Emperor, I. L. R. 32 Calc. 367	187
Hardeo Singh v. Hanuman Dat Narain, I. L. R. 26 All. 244, discussed & distinguished	486
Hardi Narain Sahu v. Ruder Perkash Misser, I. L. R. 10 Calc. 626 ; L. R. 11 I. A. 26	239
Haribole Brohmo v. Tasimuddin Mondul, 2 C. W. N. 680, followed	977
Hari Charan Bose v. Ranjit Singh, I. L. R. 25 Calc. 917n	29
Hari Dass Sanyal v. Saritulla, I. L. R. 15 Calc. 608	35
Hari Doyal Singh Roy v. Sheikh Shamsuddin 5 C. W. N. 240	495
Hari Kissen Bhagat v. Bajrang Sahai Singh, 13 C. W. N. 544	189
Hari Lal Mullick, <i>In the matter of</i> , I. L. R. 33 Calc. 1269, followed	723
Hari Lal Singha v. Rup Manjori Burmoui, 17 C. L. J. 459	711
Hari Mandal v. Keshab Chandra Manna, 16 C. W. N. 903, approved	657
Hari Singh v. King-Emperor, 6 C. L. J. 708 referred to	239
Hari Sundari Dasya v. Shashi Bala Dasya, 1 C. W. N. 195	702
Hasluck, <i>Ex parte</i> , [1895] 2 Q. B. 264, followed	621
Hayne v. Maltby, 3 T. R. 438	240
Hem Chandra Ray v. Atal Behari Ray, I. L. R. 35 Calc. 909	184
Hemchund Mujoomdar v. Mussummat Tara Munnee, 1 Mac. Sel. Rep. 481 ; 6 I. D. (O. S.) 352	480
Hem Chunder Sanyal v. Sarnamoyi Debi, I. L. R. 22 Calc. 354	741
Hendricks v. Montagu, L. R. 17 Ch. D. 638, followed	723
Hermitage v. Tomkins, 1 Lord Raymond 729	571
Hertfordshire Brewing Company, <i>In re</i> 43 L. J. N. S. Ch. 358	183
Hoare v. Osborne, L. R. 1 Eq. 585 distinguished	12
Holmes <i>Re</i> , 2 J. & H. 527	192
Hope Mills Ltd. v. Vithaldas Pranjivandas, 12 Bom. L. R. 730	315
Hopwood v. Hopwood, 7 H. L. Cas. 728, referred to	707
Horton, <i>In re</i> , 51 L. T. 420	192 ; 203
Hukum Chand Boid v. Kannalanand Singh, I. L. R. 33 Calc. 927 ; 3 C. L. J. 67, referred to	183
Hume v. Bentley, 5 De Gex. & Sm. 520	955
Hunoomanpersaud Panday v. Munraj Koonweree, 6 Moo. I. A. 393 ; 18 W. R. 81n, referred to	144
	... 343 ; 768

	Page.
Hunsraj Morarji v. Bai Moghibai, 7 Bom. L. R. 622	739
Hunter v. Attorney General, [1899] A. C. 309	201
Hurriah Chunder Chowdhry v. Kali Sunderi Debi, I. L. R. 9 Calc. 482 ; L. R. 10 I. A. 4	688
Huro Chunder Roy Chowdhry v. Shooradhanee Debia, 9. W. R. 402, referred to	955
Hurry Das Dutt v. Runjunmoney Dassee, 2 Tay. & Bell. 279 ; 2 I. D. (O. S.) 744	771
Husein v. Shankargiri Guru Sha Shambhugiri, I. L. R. 23 Bom. 119	184

## I

Ibrahim Goolam Ariff v. Saiboo, I. L. R. 35 Calc. 1	5
Imam Ali v. Poresh Mundul, I. L. R. 8 Calc. 468	459
Imdad Hasan Khan v. Badri Prasad, I. L. R. 20 All. 401	514
India and China Tea Company v. Teede, W. N. 241	576
Irrawaddy Flotilla Co. v. Bhugwandas, I. L. R. 18 Calc. 620, referred to	601 ; 716
Ishri Prasad v. Sham Lall, I. L. R. 7 All. 871	494

## J

Jackson, <i>Ex parte</i> , 1 Ves. Jun. 131, approved	815
Jacobson, <i>Ex parte</i> , L. R. 22 Ch. D. 312, distinguished	119
Jadomoney Dabee v. Sarodaprosono Mookerjee, 1 Boulnois 120 ; 3 I. D. (O. S.) 72	727
Jadu Nandan Singh v. Emperor, I. L. R. 37 Calc. 250	491
Jagadamba Chaudhrani v. Dakbina Mohun Roy Chowdhuri, I. L. R. 13 Calc. 308 ; L. R. 13 I. A. 84	976
Jagadindra Nath Roy v. Hemanta Kumari Debi, I. L. R. 32 Calc. 129	896
Jagannath v. Mannu Lal, I. L. R. 16 All. 231	976
Jagannath v. Tulsi Das, (1898) Punjab Rec No. 72	291
Jagannath Raghunath v. Narayan Lal Shethe, I. L. R. 34 Bom. 553	416
Jalabhai Ardesbir Set v. Louis Manoel, I. L. R. 19 Bom. 680, distinguished	408
Janardhan Misser v. J. Barclay, unreported	431
Janson v. Driefontein Consolidated Mines Ltd., [1902] A. C. 484	828
Jarat Kumari Dassi v. Bissessur Dutt, I. L. R. 39 Calc. 245, explained	898
Jardine Skinner & Co. v. Rani Surut Soondari Debi, 3 C. L. R. 140	36
Jeer Chetti v. Rangasawmi Chetti, 22 Mad. L. J. 52	687
Jehangir M. Cursetji v. The Secretary of State for India, I. L. R. 27 Bom. 189	506
Jentry v. Wagstaff, 14 N. C. 370	185
Jhotee Sahoo v. Omesh Chunder Sircar, I. L. R. 5 Calc. 1, not followed	260
Jogendra Nath Rai v. Baldeo Das, I. L. R. 35 Calc. 961	419
Jogessur Mullick v. Khetter Mohun Pal, I. L. R. 17 Calc. 148, referred to	95
Jogodanund Singh v. Amrita Lal Sircar, I. L. R. 22 Calc. 767	705
Johnstone v. Milling, 16 Q. B. D. 460, referred to	814



# TABLE OF CASES CITED,

12

	Page.
Joseph Suche & Co. Ld., <i>In re</i> , 1 Ch. D. 48	706
Judah v. Secretary of State for India, I. L. R. 12 Calc. 445	312
Jugdeo Narain Singh v. Raja Singh, I. L. R. 15 Calc. 656	604

## K.

Kabil Sardar v. Chandra Nath Nag Chowdhry, I. L. R. 20 Calc. 590 referred to	870
Kalee Kishen Biswas v. Sreemutty Jankee, 8 W. R. 250, referred to	402
Kalee Mohun Deb Roy v. Dhununjoy Shaha, 6 W. R. 51	731
Kali Kinkar Sett v. Dinobandhu Nandy, I. L. R. 32 Calc. 379, discussed	423
Kali Kumar Das v. Gopi Krishna Roy, 15 C. W. N. 990	678
Kali Nath Gupta v. Gobind Chandra Basu, 5 C. W. N. 293, followed	433
Kali Prosad Chatterjee v. Bhuban Mohini Dasi, 8 C. W. N. 73, considered & approved	477
Kali Prosunno Bagchee, <i>In the matter of</i> , 23 W. R. Cr. 39	491
Kameswar Pershad v. Rajkumari Ruttan Koer, I. L. R. 20 Calc. 79; L. R. 19 I. A. 234, followed	2
Kaminey Money Bewah, <i>In the goods of</i> , I. L. R. 21 Calc. 697, overruled	650
Kamini Debi v. Promotha Nath Mookerjee, 13 C. L. J. 597, followed	895; 897
Kari Singh v. Emperor, I. L. R. 40 Calc. 441 (note), explained	433
Karuppanan Servai v. Srinivasan Chetti, I. L. R. 25 Mad. 215; L. R. 29 I. A. 38	887
Kashi v. Sadashiv v. Sakharam Shet, I. L. R. 21 Bom. 229, referred to	323
Kashi Nath Bania v. Emperor, I. L. R. 32 Calc. 557	992
Kasi Viswanathan v. Emperor, I. L. R. 30 Mad. 328, followed	318
Kasturi v. Venkata Chalapati, I. L. R. 15 Mad. 412	184
Kaunsilla v. Ishri Singh, I. L. R. 32 All. 499, not followed	704
Kurut Singh v. Koolahul Singh, 2 Moo. I. A. 331; 5 W. R. (P. C.) 131	768
Keir v. Leeman, 9 Q. B. 371	115
Keir v. Leeman and Pearson, 13 L. J. Q. B. 359	118
Kessowji Issur v. Great Indian Peninsular Railway Co., I. L. R. 31 Bom. 381	404
Khaja Mahomed Hamin, <i>In re</i> , I. L. R. 3 Mad. 178	549
Khepu Nath Sikdar v. Grish Chunder Mukerjee, I. L. R. 16 Calc. 730	484
Khetra Nath Ghatak v. Piru Bamri, 13 C. L. J. 250	519
Khitish Chandra Acharjya Chowdhury v. Osmoud Beeby, I. L. R. 39 Calc. 587; 16 C. W. N. 516, distinguished	150
Khunni Lal v. Gobind Krishna Narain, I. L. R. 33 All. 356; L. R. 38 I. A. 87	411
King v. Chandra Dharma, [1905] 2 K. B. 335	705
Kinlock v. Secretary of State for India in Council, L. R. 15 Ch. D. 1	313
Kishun Pershad Chowdhry v. Tipan Pershad Singh, I. L. R. 34 Calc. 735, referred to	343
Koer Hasmat Rai v. Sunder Das, I. L. R. 11 Calc. 396	975
Kojiyadu v. Lakshmi, I. L. R. 5 Mad. 149, approved	650

	Page.
Konwar Doorga Nath Roy v. Ram Chunder Sen, I. L. R. 2 Calc. 341	896
Kapil Pooree v. Manick Sahoo, 20 W. R. 28	459
Krishna Chandra Datta Chowdhury v. Khiran Bajania, 10 C. W. N. 499, distinguished	870
Krishna Chandra Sen v. Sushila Soondury Dassee, I. L. R. 26 Calc. 611, approved	806
Krishna Dhan Mandal v. Queen-Empress, I. L. R. 22 Calc. 377, referred to	163
Krishnawa Chariar v. Narasinha Chariar, I. L. R. 31 Mad. 114	404
Kulkyan Dass v. Sheo Nundun Purshad Singh, 18 W. R. 65	516
Kumood Narain Bhoop v. Purna Chunder Roy, I. L. R. 4 Calc. 547, referred to	402
Kuttiumma v. Madhava Menon, 11 Mad. L. J. 186, followed	514

## L

Lachman Das v. Pahla Mal, (1908) Punjab Rec. No. 59	292
Ladies' Dress Association v. Pulbrook, [1900] 2 Q. B. 376	12
Lakshmi Charan Sen v. Sris Chandra Roy, 13 C. L. J. 162, referred to	45
Lala Pryag Lal v. Jai Narayan Singh, I. L. R. 22 Calc. 419	553
Lala Suraj Prosad v. Golab Chand, I. L. R. 28 Calc. 517, referred to	343
Lalchand Sew Karan v. E. I. Ry. Co., 17 C. W. N. 635 N., referred to	716
Lastings v. Gonsalves, I. L. R. 23 Bom. 539, distinguished	408
Lavergne v. Hooper, I. L. R. 8 Mad. 149, approved	814
Laxon, <i>In re</i> , [1892] 3 Ch. D. 555	9; 12
Le Mesurier v. Le Mesurier, [1895] A. C. 517, referred to	215
Leas Hotel, <i>In re</i> , [1902] 1 Ch. 332, referred to	679
Local Agents of Hooghly v. Kishnanand, 7 Mac. S. R. 476, O. R.	334
Lokenath Shah Chowdhry v. Nedu Biswas, I. L. R. 29 Calc. 382	864
London and North-Western Railway v. Westminster Corporation, [1904] 1 Ch. 759, referred to	837
London and Provincial Law Assurance Company v. London and Provincial Joint Stock Assurance Company, 17 L. J. Ch. (N. S.) 37	575
Long v. Moore, [1907] 1 Ir. Rep. 315	192
Luchmun Dass v. Giridhur Chowdhry, I. L. R. 5 Calc. 855, referred to	343

## M

Madan Mohan Gossain v. Kumar Rameswar Malia, 7 C. L. J. 615, referred to	174
Madho Parshad v. Mehrban Singh, I. L. R. 18 Calc. 157; L. R. 17 I. A. 194	793, 977
Madhub Chunder Hajrah v. Gobind Chunder Banerjee, 9 W. R. 350	731
Mahabeer Persad v. Ramyad Singh, 12 B. L. R. 90; 20 W. R. 192	977
Mahadeo v. Budhai Ram, I. L. R. 26 All. 358, referred to	955
Maheswar Dutt Tewari v. Kishun Singh, I. L. R. 34 Calc. 184, referred to	343

## TABLE OF CASES CITED.

xi

	PAGE.
Mahoda v. Kuleani, 1 Mac. Sel. Rep. 84 ; 6 I. D. (O. S.) 62	770
Mahomed Bhakku v. Queen-Empress, I. L. R. 23 Calc. 532	480
Mahomed Faiz Chowdhury v. Upendra Lal Singh Roy, 2 Ind. Cas. 597, distinguished	150
Mahomed Fayez Chowdhry v. Jamoo Gazee, I. L. R. 8 Calc. 730	808
Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh, I. L. R. 39 Calc. 527 ; L. R. 39 I. A. 68	98
Mahomed Wahiduddin v. Hakimian, I. L. R. 25 Calc. 757, referred to	955
Makhan Lal Roy v. Barada Kanta Roy, 11 C. W. N. 512, explained and distinguished	983
Malkarjun v. Narahari, I. L. R. 25 Bom. 337 ; L. R. 27 I. A. 216	49
Mancharji Sorabji Chulla v. Kongscoo, 6 Bom. H. C. 59	567
Manchester and Milford Railway Co., <i>In re</i> , 14 Ch. D. 645, referred to	679
Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608	566
Manchester Brewery Co., Ltd. v. North Cheshire and Manchester Brewery Co. Ltd, [1898] 1 Ch. 539	576
Manilal Rewadat v. Bai Rewa, I. L. R. 7 Bom. 758	677
Manik Dukandar v. Naibulla Sircar, 2 C. W. N. 461	261
Manindra Chandra Nandi v. The Secretary of State for India, I. L. R. 34 Calc. 257, 5 C. L. J. 148, referred to	503
Manmotha Nath Mitter v. Rakhal Chandra Tewary, 14 C. W. N. 752	463
Mansar Ali v. Matillah, 12 C. W. N. 895, followed	105
Manurattan Nath v. Hari Nath Das, 1 C. L. J. 500	464
Marriott v. Hampton, 2 Smith's L. C. 11 Edtion, 421	605
Marudamuthu Nandan v. Srinivasa Pillai, I. L. R. 21 Mad. 128	727
Mathura Mandal v. Ganga Charan Gope, I. L. R. 33 Calc. 1219, referred to	870
Mathura Sahu v. Damri Ram, 15 C. L. J. 337	496
Matunginee Dabee v. Joykallee Dabee, 14 W. R. (O. C.) 23	660
Mayor of Lyons v. Advocate-General of Bengal, I. L. R. 1 A. C. 91 ; I. L. R. 1 Calc. 303	201
Mehdi Hasan v. Tota Ram, I. L. R. 15 All 61, approved	239
Merchant Banking Company of London v. Merchants' Joint Stock Bank, L. R. 9 Ch. D. 560, referred to	571
Meyendorf v. Frahner, 3 Mont. 282	185
Miller v. Ram Ranjan Chakravarti, I. L. R. 10 Calc. 1014	153
Mir Ahwad Hossein v. Mahomed Askari, I. L. R. 29 Calc. 723, referred to	71
Moazam Hassan Chowdhuri v. Bhouddin, 5 C. W. N. 189	750
Moharani v. Thakur Proshad, 14 Oudh Cases 234	676
Mohendro Narain Chaturaj v. Gopal Mondul, I. L. R. 17 Calc. 769	338
Mohima Chunder Roy Chowdhry v. Ram Kishore, 23 W. R. 174	735
Mohori Bibee v. Dharmodas Ghose, I. L. R. 30 Calc. 539 ; L. R. 30 I. A. 114	601
Mohun Lal Khan v. Ramee Seroomunee, 2 Mac. Sel. Rep. 40 ; 6 I. D. (O. S.) 389	769
Mohunt Kishen Geer v. Bosgeet Roy, 14 W. R. 379	736
Mohur Mir v. Queen-Empress, I. L. R. 16 Calc. 725, referred to	511
Molam Chand v. Askuran Boid, R. A. Nos. 86, 87 of 1912 (unreported)	707
Moniram Kolita v. Keri Kolitani, I. L. R. 5 Calc 776 ; L. R. 7 I. A. 115	669
Moore v. Vestry of Fulham, [1895] 1 Q. B. 399	605

	PAGE.
Moore, <i>In re</i> , [1907] 1 Ir. Rep. 315, referred to	192
Morgan v. Bain, L. R. 10 C. P. 15, followed	523
Moshallah v. Ahmedullah, I. L. R. 13 Calc. 78	262
Moss Steamship Co. v. Whinney, [1912]. A. C. 254, referred to	679
Muddoo Soodun Doss v. Shumbhoo Nath Burmun, 2 Boulnois 40 ; 3 I. D. (O. S.) 454	779
Muhammad Umar Khan v. Muhammad Niazuddin Khan, I. L. R. 39 Calc. 418 ; L. R. 39 I. A. 19	974
Munnoo Lall v. Lalla Chooneer Lall, L. R. 1 I. A. 144 ; 21 W. R. 21	184
Munster v. Lamb, 11 Q. B. D. 588	435
Musammam Bijya Dibeh v. Musammam Unpoorna Dibeh, 1 Mac. Sel. Rep. 215, 6 I. D. (O. S.) 159	768
Musammam Ganga Jati v. Ghasita, I. L. R. 1 All. 46, approved	650
Musammam Thakoor Deyhee v. Rai Baluk Ram, 11 Moo. I. A. 139	768
Musleah v. Musleah, (1844) 1 Fulton, 420	269
Mustaffa Rahim v. Moti Lall Chuni Lall, 2 Ind. Cas. 825	549
Musyatulla v. Noor Zahan, I. L. R. 9 Calc. 808, referred to	174
Muthuswami Mudali v. Veeni Chetti, I. L. R. 30 Mad. 382, discussed and distinguished	239
Muthu Veru Mudaliar v. Vythilinga Mudaliar, I. L. R. 32 Mad. 206	730
Mutty Lall Ghose, <i>In the matter of</i> , I. L. R. 6 Calc. 308	492

## N

Nagar Valab Narsi v. The Municipality of Dhanduka, I. L. R. 12 Bom. 490	842
Nanomi Babuasin v. Modhun Mohun, I. L. R. 13 Calc. 21 ; L. R. 13 I. A. 1	345, 412
Narainbhai Vaghjibhai v. Ranchod Premchand, I. L. R. 26 Bom. 141	977
Narain Das v. Tirlok Tiwari, I. L. R. 29 All. 4	653
Narasauna v. Gangu, I. L. R. 13 Mad. 133, distinguished and dissented from	650
Narayanasami Reddi v. Osuru Reddi, I. L. R. 25 Mad. 548	604
Nassan Phosphate Company, <i>In the case of</i> , L. R. 2 Ch. D. 610	9
Nathji Muleshvar v. Lalbhai Ravidat, I. L. R. 14 Bom. 97	436
National Debenture and Assets Corporation, <i>In re</i> , [1891] 2 Ch. 505	12
National Provincial Bank of England and Marsh, <i>In re</i> , [1895] 1 Ch. 190	144
Nepin Bala Debi v. Sitikantha Banerjee, 12 C. L. J. 459	412
Newdigate Colliery, Ltd. <i>In re</i> , [1912] 1 Ch. 468, referred to	679
Nilkanta v. Imam Sahib, I. L. R. 16 Mad. 361, relied on	187
Nilmoni Singh Deo v. Tara Nath Mukerjee, I. L. R. 9 Calc. 295	520
Nilmony Poddar v. Queen-Empress, I. L. R. 16 Calc. 442, referred to	551
Nityamoni Dasi v. Madhu Sudan Sen, I. L. R. 38 Calc. 335, L. R. 38 I. A. 74, referred to	955
Nobin Kristo Mookerjee v. Russick Lall Laha, I. L. R. 10 Calc. 268	489
Nobokishore Sarma Roy v. Hari Nath Sarma Roy, I. L. R. 10 Calc. 1102, considered	721
Nogendra Nath Mullick v. Mathura Mohun Parhi, I. L. R. 18 Calc. 368	519

Narendra Nath Sircar v. Kamalbasini Dasi, I. L. R. 23 Calc. 563,	...	...	...
followed ...	...	...	279; 434
North, <i>In re</i> , [1895] 2 Q. B. 264, followed ...	...	...	240
Northumberland and Durham Banking Company, 2 De Gex and	...	...	...
Jones 357; 44 R. R. 1028 ...	...	...	12
Nubbee Buksh v. Hingon, 8 W. R. 412, commented on ...	...	...	114
Nugendra Chunder Ghose v. Kaminee Dossee, 11 Moo. I. A. 241	...	...	735
Nünd Kumar Rai v. Rajendurnaraen, 1 Mac. Sel. Rep. 349; 6 I. D.	...	...	...
(O.S.) 256 ...	...	...	769
Nundo Lal Bose v. Nistarini Dassi, I. L. R. 27 Calc. 428, referred	...	...	...
to ...	...	...	900
Nunn v. Hancock, L. R. 6 Ch. App. 850 ...	...	...	144
Nursing Narain Singh v. Roghoobur Singh, I. L. R. 10 Calc. 609	...	...	184

## O

Oakes v. Turquand, L. R. 2E. & I. App. 325, followed ...	...	...	2
Official Assignee, Bombay v. Registrar, Small Cause Court,	...	...	...
Amritsar, I. L. R. 37 Calc. 418; L. R. 37 I. A. 86, followed...	...	...	78; 81
Oojuhnnoey Dossee v. Sagormoney Dossee, 1 Tayr. and Bell 370; 2	...	...	...
I. D. (O. S.) 491 ...	...	...	771
Orde, <i>In re</i> , 24 Ch. D. 271, referred to ...	...	...	251
Othupura Naryanan Somayajipad v. Emperor, I. L. R. 33 Mad. 48	...	...	479
Owen v. Warburton, 1 B. and P. 326, referred to ...	...	...	693

## P

P. and O. S. N. Co. v. Secretary of State for India, 5 Bom. H. C.	...	...	...
App. 1 ...	...	...	314, 398
Painter, <i>Ex parte</i> , [1895] Q. B. 85 ...	...	...	687
Panchanan Singha Roy v. Dwarka Nath Roy, 3 C. L. J. 29,	...	...	...
referred to ...	...	...	955
Parbati Kumari Debi v. Jagadis Chunder Dhabal, I. L. R. 29 Calc.	...	...	...
433; L. R. 29 I. A. 82 ...	...	...	416
Parker v. London County Council, [1904] 2 K. B. 501 ...	...	...	705
Patman v. Harland, 17 Ch. D. 353 ...	...	...	567
Peary Mohun Mukerjee v. Ambica Churn Bandopadhyay, I. L. R.	...	...	...
24 Calc. 930 ...	...	...	31
Peele, <i>Ex parte</i> , 6 Ves. Jun. 602, approved ...	...	...	815
Petamber Jugi v. Nasaruddy, 25 W. R. Cr. 5 ...	...	...	697
Phillippi v. Lee, 19 Colo. 246; 35 Pacific 540 ...	...	...	186
Phoenix Bissemer Steel Co., <i>In re</i> , L. R. 4 Ch. D. 108 ...	...	...	527
Pita v. Chuni Lal Harackchand, I. L. R. 31 Bom. 207 ...	...	...	620
Ponduranga v. Nagappa, I. L. R. 12 Mad. 366 ...	...	...	333
Poresh Narain Roy v. Kassi Chunder Talukdar, I. L. R. 4 Calc.	...	...	...
661, referred to ...	...	...	174
Potaraju Venkata Reddy v. Emperor, 13 Cr. L. J. 275, dissented	...	...	...
from ...	...	...	433
Pramatha Nath Gangooly v. Khetra Nath Banerjee, I. L. R. 32	...	...	...
Calc. 270 ...	...	...	153
Prem Chand Pal v. Purnima Dasi, I. L. R. 15 Calc. 546 ...	...	...	95
Premji Jivan Bhat v. Cassum Juna Ahmed, I. L. R. 20 Bom.	...	...	...
298 ...	...	...	560
Prem Sukh Das v. Bhupia, I. L. R. 2 All. 517, referred to ...	...	...	174
President and Guardians of the Asylum, Jac. 180, distinguished	...	...	192

	PAGE.
Princess of Reuss v. Jean Bos, L. R. 5 E. & Ir. App. 176	14
Printing and Numerical Registering Company v. Sampson, L. R. 19 Eq. 462	828
Proctor v. Bennis, 36 Ch. D. 740	181
Pulin Chandra Mandal v. Bolai Mandal, I. L. R. 35 Calc. 939	723

## Q

Queen v. Baijoo Lall, I. L. R. 1 Calc. 450	491
Queen v. Inhabitants of St. Mary, Whitechapel, 12 Q. B. 120 ; 116 E. R. 811	706
Queen v. Kristna Rau, 7 Mad. H. C. R. 58	425
Queen v. Lambourn Valley Railway Company, L. R. 22 Q. B. D. 463	841
Queen v. Murphy, L. R. 2 P. C. 535, referred to	693
Queen v. Pursoram Dass, 3 W. R. Cr. 45	436
Queen v. Sabid Ali, 20 W. R. Cr. 5, distinguished	368
Queen-Empress v. Jabanulla, I. L. R. 23 Calc. 975	163
Queen-Empress v. Moorteza Ali, I. L. R. 9 Bom. 288, referred to	361
Queen-Empress v. Rachappa, I. L. R. 13 Bom. 109	482
Queen-Empress v. Sangam Lall, I. L. R. 15 All. 129, approved	899
Queen-Empress v. Srinivasalu Naidu, I. L. R. 21 Mad. 124	480
Quinn v. Leatham, [1901] A. C. 495, referred to	901

## R

Radhabai v. Anantrav Bhagvant Deshpande, I. L. R. 9 Bom. 198	976
Radha Charan Ray Chowdhry v. Golak Chandra Ghose, I. L. R. 31 Calc. 834, distinguished	807
Radha Madhub Santra v. Lukhi Narain Roy Chowdhry, I. L. R. 21 Calc. 428	519
Radha Prasad Singh v. Bal Kowar Koeri, I. L. R. 17 Calc. 726, referred to	807
Radha Prasad Wasti v. Esuf, I. L. R. 17 Calc. 414	977
Radha Shyam Sircar v. Jay Ram Senapati, I. L. R. 17 Calc. 896	737
Raghubar Sahi v. Protap Udoy Nath Sahi Deo, I. L. R. 39 Calc. 241	519
Rajaram Tewari v. Lachman Prasad, 4 B. L. R. A. C. 118 ; 12 W. R. 478	977
Raj Bullubh Sen v. Oomesh Chuander Roop, I. L. R. 5 Calc. 44	736 ; 779
Rajendra Kishore Adhikari v. Chandra Nath Dutt, 12 C. W. N. 878, distinguished	870
Raj Krishna Dey v. Bepin Behary Dey, 16 C. L. J. 194	617
Raj Lukhee Dabca v. Gokool Chuander Chowdhry, 13 Moo. I. A. 209 ; 3 B. L. R. (P. C.) 57	726
Raj Narain Mitra v. Panna Chand Singh, 7 C. W. N. 203, approved	806
Rajrup Koer v. Abul Hossein, I. L. R. 6 Calc. 394	460
Rama Chandra Padayachi v. Kondayya Chetti, I. L. R. 24 Mad. 555	414
Ramadhin Bania v. Sewbalak Singh, I. L. R. 15 Calc. 608	495
Ramananda v. Raikishori Barmani, I. L. R. 22 Calc. 347, over-ruled	650

## TABLE OF CASES CITED.

xv

	PAGE.
Ram Chandra Narayan Kulkarni v. Draupadi, I. L. R. 20 Bom. 281	553
Ram Chandra Vithuram v. Jairam, I. L. R. 22 Bom. 686	184
Ram Charan Chanda Talukdar v. Taripulla, I. L. R. 39 Calc. 774 approved	37 ; 239
Ram Charan Das v. Chatter Bhoji, 7 Mac. S. R. 205, O. E.	333
Ram Chandra Singh v. Madho Kumari, I. L. R. 12 Calc. 484 ; L. R. 12 I. A. 188, referred to	174
Ram Churn Bysack v. Luckhee Kant Bornick, 16 W. R. F. B. 1	705
Ramdhun Buxshee v. Panchanun Bose, Beng. S. D. A. R. 641	771
Ramdhun Khan v. Haradun Puramanick, 12 W. R. 404, referred to	402
Rameswar Mahton v. Dilu Mahton, I. L. R. 21 Cal'c. 550, followed in principle	56
Ram Gopal Majumdar v. Prasanna Kumar Samad, 2 C. L. J. 508, distinguished	542
Ramiengar v. Gnanasambanda Pandara Sannada, 5 Mad. H. C. R. 53	334
Ram Kanye Audhicary v. Cally Churn Dey, I. L. R. 21 Calc. 840, not followed	711
Ram Krishna Kuppui Swami v. Tripurabai, 13 Bom. L. R. 940	739
Ram Kumar Shaha v. Ram Gour Shaha, I. L. R. 37 Calc. 67, distinguished	187
Ram Narayan Sahu v. Maangru Urao, 4 C. W. N. 792	859
Ram Nath Chamar v. Ram Saran Lall, 1 C. W. N. 529	425
Ram Nath Tolapattro v. Durga Sundari Debi, I. L. R. 4 Calc. 550, overruled	650
Ram Pershad Singh v. Lakhpati Koer, I. L. R. 30 Calc. 231, distinguished	408
Ramphal Rai v. Tula Kuari, I. L. R. 6 All. 116	726
Ramprasad v. Mt. Subu Bai, 4 Nag. L. R. 31	674
Ram Prasad Mala, <i>In re</i> , I. L. R. 37 Calc. 13	496
Randell, <i>In re</i> , L. R. 38 Ch. D. 213	203
Randell v. Dixon, L. R. 38 Ch. D. 213	203
Rangappa Naik v. Kamti Naik, I. L. R. 31 Mad. 366	730
Rangoon Botatoung Company v. Collector of Rangoon, I. L. R. 40 Calc. 21 ; L. R. 39 I. A. 197	640 ; 687
Rany Srimuty Dibeah v. Rany Koond Luta, 4 Moo. I. A. 292 ; 7 W. R. P. C. 44	769
Rashleigh, <i>Ex parte</i> , 2 Ch. D. 9	706
Rasik Lal Datta v. Bidhumukhi Dasi, I. L. R. 33 Calc. 1094, distinguished	870
Rathua Naidu v. Aiyanaachariar, 18 Mad. L. J. 599	411
Redgrave v. Hurd, 20 Ch. D. 1	182
Reg. v. Hill, 3 Cox. C. C. 533 ; 1 Den. C. C. 453, distinguished	990
Reg. v. Leeds and Bradford Railway Company, 21 L. J. M. C. 193	706
Republic of Costa Rica v. Erlanger, 3 Ch. D. 62	706
Rewa Prasad Sukul v. Deo Dutt Ram Sukul, I. L. R. 27 Calc. 515 ; L. R. 27 I. A. 39	973
Rex v. Clewes, 4 C. & P. 221, referred to	873
Rex v. Higgins, 3 C. & P. 603, referred to	873
Rex v. Steptoe, 4 C. & P. 397, referred to	873
Rey v. Leconturier, 25 Pat. Rep. 265 ; 27 Pat. Rep. 268	819
Robins v. Goldingham, L. R. 13 Eq. 440	388

	PAGE.
Robinson, <i>In re</i> , [1892] 1 Ch. 95, distinguished ...	193
Robinson v. Currey, 7 Q. B. D. 465 ...	706
Robinson v. Local Board of Barton-Eccles, L. R. 8 A. C. 798 ...	841
Rogerson, <i>In re</i> . Bird v. Lee, [1901] 1 Ch. 715, distinguished ...	192
Rolfe and the Bank of Australia v. Flower Salting & Co., L. R. 1 P. C. 27, approved ...	815
Roop Churn Mohapater v. Anundlal Khan, 2 Mac. Sel. Rep. 45; 61 I. D. (O. S.) 392 ...	769
Roshun Lall v. Ram Lall Mullick, I. L. R. 30 Calc. 262 ...	620
Ross Johnson v. Secretary of State, 2 Hyde. 153 ...	315
Royal Aquarium v. Parkinson, [1892] 1 Q. B. 431 ...	435
Rucknaboye, Her Highness v. Lulloobhoy Motichund, 5 Moo. I. A. 234 ...	705
Rudra Narain Roy, <i>In the matter of</i> , I. L. R. 28 Calc. 479 ...	591
Rugby Portland Cement Co., Ltd. v. Rugby and Newbold Portland Cement Co., Ltd., 8 R. P. C. 241; (C. A.) 9 R. P. C. 46, distinguished ...	571
Runchordas Vandravandas v. Parvatibai, I. L. R. 23 Bom. 725; L. R. 26 I. A. 71, referred to ...	233
Rundle v. Secretary of State in Council, 1 Hyde 37 ...	314
Rungo Lal Mundul v. Abdool Guffoor, I. L. R. 4 Calc. 314, referred to ...	174
Rupchand v. Jambu Parshad, I. L. R. 32 All. 247; L. R. 37 I. A. 93 ...	886
S	
Saadatmand Khan v. Phul Kuar, I. L. R. 20 All. 412; L. R. 25 I. A. 146 ...	637
Sadler v. Leigh, 4 Camp. 195, approved ...	335
Sahdeo Pandey v. Ghasiram Gyawal, I. L. R. 21 Calc. 19, not followed ...	45
Sajjad Husain v. Wazir Ali Khan, I. L. R. 34 All. 455; L. R. 39 I. A. 156 ...	887
Salig Ram v. Ramji Lal, I. L. R. 28 All. 554 ...	481
Salomon v. Salomon & Co., [1897] A. C. 22 ...	10
Sandback Charity Trustee v. North Staffordshire Railway Company, L. R. 3 Q. B. D. 1, followed ...	21
Sankar Nath Mukerji v. Bejoy Gopal Mukerji, 13 C. W. N. 201 ...	724
Sarala Sundari Dassi v. Sarada Prosad Sur, 2 C. L. J. 602 ...	422
Sarat Chander Bose v. Saraswati Debi, I. L. R. 34 Calc. 216 ...	262
Sarat Chunder Dey v. Gopal Chunder Laha, I. L. R. 20 Calc. 296 ...	173
Sardari Mal v. Khan Bahadur Khan, (1899) Punjab Rec. No. 11 ...	291
Sarna Moyee Bewa v. Secretary of State for India, I. L. R. 25 Calc. 254, overruled ...	650
Sattya Sankar Ghoshal v. Golapmoni Debee, 5 C. W. N. 223 ...	152
Saunmoney Dossee v. Nemy Churn Doss, 2 Tay. and Bell. 300; 2 I. D. (O. S.) 577 ...	660
Secretary of State for Foreign Affairs v. Charlesworth, [1901] A. C. 373; L. R. 28 I. A. 121 ...	23
Secretary of State for India v. Hari Bhanji, I. L. R. 5 Mad. 273 ...	313, 434
Secretary of State for India v. India General Steam Navigation Company, I. L. R. 36 Calc. 967; L. R. 36 I. A. 200 ...	23
Secretary of State for India v. Perumal Pillai, I. L. R. 24 Mad. 279, referred to ...	503



## TABLE OF CASES CITED.

xvii

	PAGE.
Seshadri Ayyangar v Nataraja Ayyar, I. L. R. 21 Mad. 179 ...	334
Sethna v. Mirza Mahomed Shirazi, 9 Bom. L. R. 1044, referred to	900
Sham Chand Mitter v. Juggut Chundra Sircar, 22 W. R. 541, referred to	623
Sham Sundar Lal v. Achhan Kunwar, I. L. R. 21 All. 71 ; L. R. 25 I. A. 183	724
Shama Soonduree v. Shurut Chunder Dutt, 8 W. R. 500	779
Shankarbhai v. Somabhai, I. L. R. 25 Bom. 417, followed	537
Sharup Chand Mala v. Pat Dasse, I. L. R. 14 Calc. 627	144
Shaw v. Gould, L. R. 3 E. & I. App 55, referred to	215
Sheikh Samiruddin v. Srimati Kadumoyi Dasi, 15 C. W. N. 244	678
Sheobarut Ram v. B. and N. W. Ry. Co., 16 C. W. N. 766, not followed	716
Sheonanth Rai v. Musammat Dayamyee Chowdrain, 2 Mac. Sel. Rep. 137 ; 6 I. D. (O. S.) 462	660
Sheo Progash Tewari v. Bhoop Narain Prosad Pathak, I. L. R. 22 Calc. 759	850
Sheo Prosad v. Hiralal, I. L. R. 12 All. 440	638
Sheshgiri Shanbhog v. Salvador Vas, I. L. R. 5 Bom. 5	184
Shibnath Talaputtre v. Sat Cowrie Deb, 3 W. R. 198	436
Shivabhajan v. The Secretary of State for India, I. L. R. 28 Bom. 314, referred to	452
Shrinivas Murar v. Hanmant, I. L. R. 24 Bom. 260	735
Shyam Kumari v. Rameswar Singh, I. L. R. 32 Calc. 27 ; L. R. 31 I. A. 176	96
Singer Manufacturing Co. v. Loog., L. R. 8 A. C. 15, referred to	281
Sital Das Babaji v. Protap Chandra Sarma, 11 C. L. J. 2, referred to	251
Siva Sangu v. Minal, I. L. R. 12 Mad. 277, distinguished and dissented from	650
Sloman v. Government of Newzealand, L. R. 1 C. P. D. 563	312
Smirthwaites Trusts, <i>In re</i> , L. R. 11 Eq. 251, referred to	251
Smith v. Chorley Rural Council, [1897] 1 Q. B. 678, followed	837
Sobha Singh v. Kishore Chand (1907) Punjab Rec. No. 65	293
Sonnum Sookul v. Shaikh Elahce Buksh, 7 W. R. 453, approved	806
Soorendranath Roy v. Musammat Heeramonee Burnoneah, 12 Moo. I. A. 81	416
Special Officer, Salsette Building Sites v. Dasabhai Bezanji Motiwala, 17 C. W. N. 421	687
Sreekanta Prasad v. Irshad Ali Sircar, 16 C. L. J. 225, approved	806
Srimati Giribala Debia v. Srimati Rani Mina Kumari, 5 C. W. N. 497	184
Srimati Rai Kishori Dasya v. Mukunda Lal Dutt, 15 C. W. N. 965	707
Srinath Dass v. Hari Pada Mitter, 3 C. W. N. 637	735
Stallmann, <i>In the matter of</i> , I. L. R. 39 Calc. 164	435
Standish v. Ross, 3 Exch. 527	181
Stapleton, <i>Ex parte</i> , L. R. 10 Ch. D. 586	526
Starey v. Graham, [1899] 1 Q. B. 406	705
Stones v. Byron, 4 Dowl. & L. 393, referred to	900
Straker v. Graham, 4 M. & W. 721, referred to	693
Stratheden and Campbell, <i>In re</i> , [1894] 3 Ch. 265, distinguished	193
Subbaraya Mudali v. The Government, 1 Mad. H. C. 286	315
Subbaraya Pillai v. Ramasami Pillai, I. L. R. 23 Mad. 171, approved	650
Subrahmania Ayyar v. King-Emperor, I. L. R. 25 Mad. 61 ; L. R. 28 I. A. 257, followed	318 ; 846

	PAGE.
Suknandan Singh v. King Emperor, 17 C. L. J. 392, approved ...	631
Sundar Koer v. Sham Krishen, I. L. R. 34 Calc. 150 ; L. R. 34 I. A. 9, referred to ...	711
Sundari Dassee v. Nemye Charan Daw, 6 C. L. J. 372, approved	650
Sundari Letani v. Pitambari Letani, I. L. R. 32 Calc. 871, overruled ...	650
Suraj Bansi Koer v. Sheo Persad Singh, I. L. R. 5 Calc. 148 ; L. R. 6 I. A. 88, referred to ...	342
Surbomungala Dabee v. Mohendronath Nath, I. L. R. 4 Calc. 508, referred to ...	233
Surendra Nath Banerjee v. Chief Justice, I. L. R. 10 Calc. 109 ...	435
Surjya Hariani v. King-Emperor, 6 C. W. N. 295 ...	492
Sutton v. Jenkins, 147 N. C. 11 ; 60 S. E. 643 ...	186

## T

Tara Muneo Dassee v. Motee Buneaneo, 7 Mac. Sel. Rep. 325 ; 8 I. D. (O. S.) 246, overruled ...	650
Tarapado Ghose v. Kamini Dassi, I. L. R. 29 Calc. 644, referred to	955
Taylor v. Stibbert, 2 Ves. Jun. 437 ; 2 R. R. 278 ...	567
Tellis v. Sandanba, I. L. R. 10 Mad. 69 ...	418
Tempest, <i>In re.</i> , L. R. 1 Ch. App. 485, referred to ...	251
Thakur Magumdeo v. Thakur Mahadeo Singh, I. L. R. 18 Calc. 647 ...	35
Thorburn v. Barnes, L. R. 2 C. P. 384 ...	228
Tilukdhari Singh v. Chulan Mahton, I. L. R. 17 Calc. 131, referred to ...	807 ; 813
Tollhurst v. Associated Portland Cement Manufacturer, [1902] 2 K. B. 671 ...	527
Towler v. Chatterton, 6 Bing. 253 ; 130 E. R. 1280 ; 31 R. R. 411 ...	705
Trey v. Ramsour, 66 N. C. 466 ...	185
Tribhuvan Das Kallindas Gajjar v. Jivan Chand, I. L. R. 35 Bom. 196, referred to ...	219
Trikumdas Damodhar v. Haridas Morarji, I. L. R. 31 Bom. 583, referred to ...	232
Trilochun Chuckerbutty v. Umesh Chunder Lahiri, 7 C. L. R. 571 736 ; 779	
Tripura Charan Banerjee v. Harimati Dassi, I. L. R. 38 Calc. 493, approved ...	650
Trivivan v. Lawrence, 6 Modern 256 ...	183
Troyluckha Tarinee Dassia v. Mohima Chunder Muttuck, 7 W. R. 400, referred to ...	174
Tyler, <i>In re.</i> , [1891] 3 Ch. 252, distinguished ...	192

## U

Uday Chand Maiti v. Ram Kumar Khara, 15 C. W. N. 213 ...	678
Udell v. Atherton, 7 H. & N. 172, approved ...	335
Umatara Gupta v. Uma Charan Sen, 3 C. L. J. 52, referred to	95
Umatul Batul v. Nanji Koer, 11 C. W. N. 705 ; 6 C. L. J. 427, referred to ...	245 ; 617
Underwood, Son and Pipers v. Lewis, [1894] 2 Q. B. 306 ...	388
Upadhya Thakur v. Persidh Singh, I. L. R. 23 Calc. 723, referred to ...	428

## V

## PAGE.

Vadilal <i>v.</i> Burditt & Co., I. L. R. 30 Bom. 61	...	...	819
Vaise <i>v.</i> Delaval, 1 T. R. 11	...	...	696
Varnum <i>v.</i> Ahbat, 12 Mass. 474 ; 7 Am. Dec. 87	...	...	185
Vasudev Sadasiv Modak <i>v.</i> The Collector of Ratnagiri, I. L. R. 2 Bom. 99 ; L. R. 4 I. A. 119	...	...	401
Vaughan <i>v.</i> Thomas, L. R. 33 Ch. D. 187, distinguished	...	...	192
Vaughan, <i>In re</i> , L. R. 33, Ch. Div. 187, distinguished	...	...	192
Vinyak Vithal Bhangé <i>v.</i> Govind Venkatesh Kulkarni, I. L. R. 25 Bom. 129	...	...	742
Virasami Nayudu <i>v.</i> Suba Rau, I. L. R. 6, Mad. 54	...	...	334

## W

Wafadar Khan <i>v.</i> Queen Empress, I. L. R. 21 Calc. 955, distinguished	...	...	368
Walsh <i>v.</i> Lonsdale, 21 Ch. D. 9	...	...	566
Walter <i>v.</i> Ashton, [1902] 2 Ch. 282	...	...	576
Waring <i>In re</i> . Hayward <i>v.</i> Attorney-General, [1907] 1 Ch. 166	...	...	201
Warner <i>v.</i> Murdoch, 4 Ch. D. 750	...	...	706
Wasik Ali <i>v.</i> Government, 6, Mac. S. R. 130 N. E.	...	...	333
Wasik Ali Khan <i>v.</i> Government, 5 Mac. S. R. 363 O. E.	...	...	333
Webb <i>v.</i> Austin, 7 M. & G. 701	...	...	184
White's Trusts, <i>In re</i> L. R. 33 Ch. D. 449	...	...	201
Williams <i>v.</i> Bayley, L. R. 1 H. L. 200	...	...	115
Williams <i>v.</i> Harding, L. R. 1 H. L. 9	...	...	706
Williams <i>v.</i> Kershaw, 5 Cl. & F. 111, referred to	...	...	233
Windhill Local Board of Health <i>v.</i> Vint., 45. Ch. D. 351	...	...	116
Woolfun Bibi <i>v.</i> Jesarat Sheikh, I. L. R. 27 Calc. 262, distinguished	...	...	433
Wright <i>v.</i> Hale, 6 H. & N. 227 ; 123 R. R. 477	...	...	705
Wright <i>v.</i> Tugwell, [1892] 1 Ch. 95, distinguished	...	...	193

## Y

Ydun, The, [1899] P. 236	...	...	705
--------------------------	-----	-----	-----



THE  
INDIAN LAW REPORTS,  
*Calcutta Series.*

---

PRIVY COUNCIL.

---

MOOSA GOOLAM ARIFF

v.

EBRAHIM GOOLAM ARIFF.

P.C.<sup>3</sup>

1912

June 11, 12.  
26.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA, AT RANGOON.]

*Companies Act (VI of 1882) ss. 6, 40, and 41—Certificate of Incorporation of Company, effect of—Objection to Formation of Company, the Memorandum of Association not being signed by seven persons as required—Matter in issue not made ground of attack in former suit—Res judicata—Civil Procedure Code, 1882, s. 13.*

The provisions of the Indian Companies Act (VI of 1882) as regards the incorporation of Companies are the same as those contained in the Imperial Act of 1862, except that it is specially provided in section 40 of the Indian Act that it is not the duty of the Registrar to require evidence as to whether the subscribers to the Memorandum of Association are competent to contract.

Section 6 of the Act provides that "any seven or more persons . . . . . may, by subscribing their names to a Memorandum of Association and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated Company, etc." And s. 41 enacts that "a certificate of the incorporation of any Company given by the Registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with."

<sup>3</sup>*Present*: LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

1912

MOOSA  
GOOLAM  
ARIFF  
v.  
EBRAHIM  
GOOLAM  
ARIFF.

The Memorandum of Association of a proposed Company was signed before the Registrar by two adult persons, and also by a person who under the Guardians and Wards Act (VIII of 1890) had been duly appointed by the Court guardian of five minors, the guardian making a separate signature for each minor; and the Registrar issued a certificate of the due incorporation of the Company. In a suit in which it was objected, *inter alia*, that the Company was not properly constituted, the Memorandum of Association not having been signed by the required number of seven subscribers:—

*Held* (reversing the decision of the Chief Court of Lower Burma on its Appellate Side), that assuming the conditions of registration were not duly complied with, the certificate of incorporation was conclusive for all purposes, and the Court could not go behind it and consider any alleged defects in the formation or constitution of the Company.

*In re Burned's Banking Company. Peel's Case* (1) per Lord Cairns L. J., and *Oakes v. Turquand* (2) per Lord Chelmsford L. C. followed.

But apart from the English decisions, the use of the word "otherwise" in s. 6 of Act VI of 1882 showed that the statutory condition that the Memorandum of Association must be signed by seven or more persons was as much a condition of registration as any other to be found in the Act, which was preliminary to registration and apparently essential.

*Held*, also, that the issue as to the invalidity of the Company might and ought to have been made a ground of attack in a former suit brought by the same plaintiff against the same defendants in 1902 which had been dismissed. All the facts, on which the present suit was based, were known to the plaintiff and were stated at length in the proceedings in the former suit. No further evidence would have been needed. Nothing was wanting but the addition of an issue on the point. The present suit as regards that question was therefore barred as *res judicata* under s. 13. Explanation 2 of the Civil Procedure Code, 1882.

*Kameswar Pershad v. Rajkumari Ruttan Koer* (3) followed.

APPEAL from a judgment and decree (1st August 1910) of the Chief Court of Lower Burma on its Appellate Side which reversed a judgment and decree (January 5th, 1909) of the same Court on its Original Side.

The defendants were the appellants to His Majesty in Council.

(1) (1867) L. R. 2 Ch. App. 674, 680. (3) (1892) I. L. R. 20 Cal. 79.  
(2) (1867) L. R. 2 E. & Ir. App. 325, 334. L. R. 19 I. A. 234.

The facts which led to the institution of the suit out of which the present appeal arose, were that one Hadjee Goolam Ariff, a wealthy Mahomedan merchant of Rangoon, being early in 1902 about 65 years of age and in bad health, was desirous of disposing of his property during his lifetime in such a way as would provide for his two junior wives and five infant children, and prevent his two eldest sons on whom he had expended much money and who had proved ungrateful, from having any control over the minors' shares or the bulk of his property, and also to prevent his property, which he wished to have kept as a whole, from being distributed.

In March 1902, with these objects in view, Hadjee Goolam Ariff petitioned the Chief Court, under the Guardians and Wards Act (VIII of 1890), to appoint one Hashim Cassim Patail guardian of the property of his infant children during their minority. The petitions stated that the application was made to enable Hashim Cassim Patail as such guardian to take possession and charge of the infants' shares in the property to be conveyed to them, and to sign certain Articles of Association of a Company then under formation, and which was subsequently formed under the name of the Goolam Ariff Estate Company, Limited. The prayer of these petitions was granted on 10th April 1902, and Hashim Cassim Patail was duly appointed guardian of the infants' property.

On 2nd April 1902, Goolam Ariff executed seven deeds in favour of his two junior wives and five infant children respectively of certain undivided shares in 18 parcels of land in Rangoon, and shares in six trading companies of limited liability which for the purpose of the deeds he considered as being divided into 2,000 parts; of these he conveyed 850 to his wives and children, and kept 1,150 for himself.

1912

MOOSA  
GOOLAM  
ARIFF  
v.EBRAHIM  
GOOLAM  
ARIFF.

1912

MOOSA  
GOOLAM  
ARIFF  
v.  
EBRAHIM  
GOOLAM  
ARIFF.

On 11th April 1902, the Memorandum and Articles of Association of the Goolam Ariff Estate Company were signed by Goolam Ariff himself, by one of his wives and by each of the five infant children by their guardian, Hashim Cassim Patail. The Memorandum and Articles of Association were duly registered the next day (April 12th, 1902), and the certificate of incorporation dated on that day was issued by the Registrar of Joint Stock Companies pursuant to the Indian Companies Act (VI of 1882). Subsequently, between 22nd April and 3rd May 1902, the whole of the property originally conveyed to the wives and children as well as the portion retained by Goolam Ariff himself were transferred to the Goolam Ariff Estate Company in return for shares in the Company, the number of shares assigned to each of the members being the same as the number of 2,000th parts held by each member under the distribution of 2nd April above mentioned. In particular by a deed dated 3rd May 1902, and made between Goolam Ariff and the two junior wives and five minor children of the one part and the Goolam Ariff Estate Company of the other part, Goolam Ariff and the wives and children (the latter by their guardian) conveyed all their respective shares in the lands, tenements and hereditaments mentioned in the schedule thereto (which consisted of the 18 parcels of land in Rangoon) unto and to the use of the Company.

On 19th April 1902, Goolam Ariff executed his last will and testament and as executors thereof he made his three brothers, his eldest son Ebrahim Goolam Ariff, one of the present respondents, and Hashim Cassim Patail, the guardian of his infant children. On 16th May Goolam Ariff died, and probate of his will was granted to his eldest son Ebrahim Goolam Ariff on 23rd June 1902, and to Hashim Cassim Patail on



15th July 1902. The other executors did not take out probate.

Subsequently to his father's death the respondent Ebrahim Goolam Ariff by proceedings in the Courts to set aside the disposition of his property made by his father by the deeds of April 2nd and 3rd May 1902, and the formation of the Goolam Ariff Estate Company. On 16th July 1902, he instituted a suit (146 of that year) to have it declared that the deeds of 2nd April and 3rd May were void and should be delivered up to be cancelled on grounds based chiefly on principles of Mahomedan law; and also as regards the deed of 3rd May 1902, that it was void as being made without consideration and not in accordance with the provisions of the Indian Companies Acts. Both Courts in Burma dismissed the suit. In the Burma Appellate Court the question as to the validity of the signatures to the Memorandum of Association of the Company was raised and much discussed, though it had not been set up in the original trial; and one of the respondent's grounds of appeal to His Majesty in Council was that the Court below should have held that the circumstance that, out of the seven persons who purported to constitute themselves into the Goolam Ariff Estate Company, four were minors, invalidated the transaction, the subject matter of that suit. On 3rd July 1907. His Majesty in Council confirmed the judgments of the Burma Courts (1). In 1904, Ebrahim Goolam Ariff presented a petition to the Chief Court of Lower Burma (Civil Miscellaneous Petition 68 of 1904) for the winding up of the Goolam Ariff Estate Company on the ground that it had never been duly constituted because of the matters set up in the present suit, but he withdrew that petition at the hearing on 2nd August, 1904. In September 1904, while the

1912

MOOSA  
GOOLAM  
ARIFF  
v.  
EBRAHIM  
GOOLAM  
ARIFF.

(1) See *Ibrahim Goolam Ariff v. Saiboo*, I. L. R. 35 Cal. 1.

1912  
MOOSA  
GOOLAM  
ARIFF  
v.  
EBRAHIM  
GOOLAM  
ARIFF.

former suit was under appeal to His Majesty in Council, Ebrahim Goolam Ariff instituted the present suit against all the appellants except the Goolam Ariff Estate Company by filing on 13th September a plaint which under subsequent orders was amended by making Ebrahim Goolam Ariff sue as executor of the estate of Goolam Ariff deceased, and adding the official Receiver (who had been appointed by the Court in the previous suit Receiver of the property of Goolam Ariff in question in that suit) as co-plaintiff and the Goolam Ariff Estate Company as co-defendant.

The plaint as amended was delivered on 11th July 1905, and claimed that the Goolam Ariff Estate Company was not and never had been a properly incorporated Company, and that the memorandum and certificate of registration of the Company should be declared void, and that no Company had been constituted thereby, and the property purported to have been conveyed to the Company should be transferred to the persons entitled to the same.

The defendants in their written statements denied the right of the plaintiff Ebrahim Goolam Ariff to maintain the suit either personally or as executor, and alleged that the plaintiffs were estopped by reason of the withdrawal of their proceedings to wind up the defendant Company on the grounds on which they based their present action in Civil Miscellaneous Petition 68 of 1904, the matters being *res judicata* and also because of the proceedings in the previous suit. They further pleaded that the Certificate of Incorporation was conclusive as to the proper formation of the defendant Company.

Issues were raised and settled, of which only the 3rd and 4th were material to the present appeal, namely—

(3) Is this suit barred by the withdrawal of proceedings in Civil Miscellaneous No. 68 of 1904.

and by Civil Regular No. 146 of 1902 and the order and decree respectively passed in those proceedings, and by reason of the judgment and decree in the suit of 1902?

(4) Is the Certificate of Incorporation of the Company conclusive as to its due incorporation, and has this Court any jurisdiction to question its validity?

Apart from the issues as to the proper parties to sue which were disposed of as preliminary points, BIGGE J., before whom the suit first came, held, on 22nd December 1905, as to issues (3) and (4) that the number of signatories to the Memorandum of Association was not sufficient to satisfy the provisions of the Indian Companies Act; but that the Court had no power to go behind the Certificate of Incorporation; and that though the suit was not barred by the result of the previous suit 146 of 1902, its subject matter was *res judicata* in consequence of the proceedings for winding up the Company (Civil Miscellaneous 68 of 1904).

On appeal from that decision the Appellate Court (C. E. FOX C. J. and IRWIN J.), held, on 16th July 1906, that owing to the pendency of the prior suit 146 of 1902 before His Majesty in Council in which the subject matter was, or might be, the same, the Chief Court of Lower Burma was, by reason of section 12 of the Civil Procedure Code, not competent to try the suit, though there was no prohibition against its institution. The Appellate Court, therefore, while setting aside the decision of BIGGE J., ordered that the proceedings and the trial of the suit should be stayed until the decision of the Privy Council had been given.

After the decision of His Majesty in Council (which affirmed the decisions of the Courts below) in 146 of 1902, was made known the present suit was reheard before ROBINSON J. who on 5th January 1909, decided in favour of the defendants, the present appellants.

1912

MOOSA  
GOOLAM  
ARIEF

r.

EBRAHIM  
GOOLAM  
ARIEF.

1912

MOOSA  
GOOLAM  
ARIFF  
v.  
EBRAHIM  
GOOLAM  
ARIFF.

He was of opinion that the present suit was not barred by the decisions in the previous suit (146 of 1902) on the ground that the matter in issue in the present suit was not directly and substantially in issue in the former suit, nor was it heard and finally decided. He also held that the suit was not barred by the withdrawal of the proceedings in the petition for winding up the defendant company (68 of 1904) because under certain provisions of the Civil Procedure Code a petition under the Companies Act did not bar a suit governed by the Code even though the object of both was the same.

On the question raised in the 4th issue the learned Judge referred to the Indian Companies Act (VI of 1882) and the English Companies Act of 1862, which he said was followed "very closely and indeed almost verbatim" by the Indian Act. "The decisions of the English Courts" he remarked "also were embodied, as for instance, in the explanation added to section 6 of the Indian Act;" and was of opinion that "this was done deliberately by the Legislature," and that "this being so the decision of the English Courts are peculiarly authoritative, and cannot be disregarded, and this is all the more so as there are no decisions of the Indian Courts on the point."

After referring to and discussing a large number of English cases bearing on the force and effect of the certificate of incorporation on antecedent defects and irregularities in the constitution and formation of a company, he came to the conclusion that the certificate was final as to all antecedent requisites and that the Court could not go behind it, and question the validity of the signatures to the Memorandum of Association, or the competence of the signatories to contract. Though no further question arose the learned Judge, as to the sufficiency of the

signatures to the Memorandum of Association, differed from the decision of BIGGE J. and expressed his opinion that they were sufficient to satisfy the provisions of the Companies Act. He said :

“ That a guardian can make a contract for his ward is beyond question. In this case the guardian has conveyed his wards’ properties to the company, and that conveyance the plaintiff sought to have declared void, and failed. A guardian under the Guardians’ and Wards’ Act, 1890, may, subject to the provisions of that Act, do all acts which are reasonable and proper for the protection or benefit of the property. If the guardian disposes of the property in contravention of the provisions of the Act, the disposal is voidable but only at the instance of the persons affected thereby. Here the guardian exchanged the property for shares in the Company, and the plaintiffs are probably, though I did not decide the point, not affected thereby since the gifts to the minors are good. Had the minors themselves signed the memorandum this Court, I have held, could not go behind the certificate. If the signatures create contracts, then the proper way to enter into a contract with the minor is through his guardian, and this is what has been done. At least the contract is voidable and thus the case is brought within the decisions in the cases of the *Nassau Phosphate Company* (1) and *In re Laxon* (2).”

The suit was consequently dismissed with costs.

An appeal by the plaintiffs was heard by SIR C. E. FOX, Chief Judge, and PARLET J. who delivered judgment reversing the decision of the Court below on the ground that the Certificate of Incorporation was only conclusive that the requirements of the Act as regards registration were complied with, and that subscription by seven or more persons was not one of the requirements of the Act for registration. They agreed with the Court below that the suit was not barred as *res judicata* in consequence of the previous litigation. The material portion of the judgment was as follows :—

“ The memorandum was not signed by seven persons but by three only. One of those three signed his name five times as guardian of the several minors whose names are printed as subscribers to the memorandum. It is

1912  
MOOSA  
GOOLAM  
ARIFF  
v.  
EBRAHIM  
GOOLAM  
ARIFF.

(1) (1876) L. R. 2 Ch. D. 610.

(2) [1892] 3 Ch. D. 555.

1912  
MOOSA  
GOOLAM  
ARIFF  
v.  
EBRAHIM  
GOOLAM  
ARIFF.

He was of opinion that the present suit was not barred by the decisions in the previous suit (146 of 1902) on the ground that the matter in issue in the present suit was not directly and substantially in issue in the former suit, nor was it heard and finally decided. He also held that the suit was not barred by the withdrawal of the proceedings in the petition for winding up the defendant company (68 of 1904) because under certain provisions of the Civil Procedure Code a petition under the Companies Act did not bar a suit governed by the Code even though the object of both was the same.

On the question raised in the 4th issue the learned Judge referred to the Indian Companies Act (VI of 1882) and the English Companies Act of 1862, which he said was followed "very closely and indeed almost verbatim" by the Indian Act. "The decisions of the English Courts" he remarked "also were embodied, as for instance, in the explanation added to section 6 of the Indian Act;" and was of opinion that "this was done deliberately by the Legislature," and that "this being so the decision of the English Courts are peculiarly authoritative, and cannot be disregarded, and this is all the more so as there are no decisions of the Indian Courts on the point."

After referring to and discussing a large number of English cases bearing on the force and effect of the certificate of incorporation on antecedent defects and irregularities in the constitution and formation of a company, he came to the conclusion that the certificate was final as to all antecedent requisites and that the Court could not go behind it, and question the validity of the signatures to the Memorandum of Association, or the competence of the signatories to contract. Though no further question arose the learned Judge, as to the sufficiency of the

signatures to the Memorandum of Association, differed from the decision of BIGGE J. and expressed his opinion that they were sufficient to satisfy the provisions of the Companies Act. He said :

"That a guardian can make a contract for his ward is beyond question. In this case the guardian has conveyed his wards' properties to the company, and that conveyance the plaintiff sought to have declared void, and failed. A guardian under the Guardians' and Wards' Act, 1890, may, subject to the provisions of that Act, do all acts which are reasonable and proper for the protection or benefit of the property. If the guardian disposes of the property in contravention of the provisions of the Act, the disposal is voidable but only at the instance of the persons affected thereby. Here the guardian exchanged the property for shares in the Company, and the plaintiffs are probably, though I did not decide the point, not affected thereby since the gifts to the minors are good. Had the minors themselves signed the memorandum this Court, I have held, could not go behind the certificate. If the signatures create contracts, then the proper way to enter into a contract with the minor is through his guardian, and this is what has been done. At least the contract is voidable and thus the case is brought within the decisions in the cases of the *Nassau Phosphate Company* (1) and *In re Laxon* (2)."

The suit was consequently dismissed with costs.

An appeal by the plaintiffs was heard by SIR C. E. FOX, Chief Judge, and PARLET J. who delivered judgment reversing the decision of the Court below on the ground that the Certificate of Incorporation was only conclusive that the requirements of the Act as regards registration were complied with, and that subscription by seven or more persons was not one of the requirements of the Act for registration. They agreed with the Court below that the suit was not barred as *res judicata* in consequence of the previous litigation. The material portion of the judgment was as follows :—

"The memorandum was not signed by seven persons but by three only. One of those three signed his name five times as guardian of the several minors whose names are printed as subscribers to the memorandum. It is

1912

MOOSA  
GOOLAM  
ARIFF  
v.EBRAHIM  
GOOLAM  
ARIFF.

(1) (1876) L. R. 2 Ch. D. 610.

(2) [1892] 3 Ch. D. 555.

1912

MOOSA  
GOOLAM  
ARIEFF  
P.  
EBRAHIM  
GOOLAM  
ARIEFF.

difficult to understand how a Registrar could have accepted and registered such a memorandum, although under section 40 of the Act he was not bound to require evidence as to whether the subscribers to it were competent to contract, it was at least his duty to satisfy himself that seven or more persons had signed it.

"The essential requirement for the formation of a Company, viz., seven or more persons associated for a lawful purpose signing their names to a Memorandum of Association, was absent in the case of this Company, and *prima facie* it could not and never did come into existence as a Company under the Indian Companies' Act, 1882. It was contended on behalf of the Company and stated by the learned Judge who heard the suit that whatever may have been the defects in the formation of a Company, it came into existence by virtue of the registration of the Memorandum and the Certificate of Incorporation signed by the Registrar. This view is mainly based on the following portion of section 41 of the Act:—'A certificate of the incorporation of any Company given by the Registrar shall be conclusive evidence that all requisitions of this Act in respect of registration have been complied with.'

"The effect of a similar provision in the (English) Companies Act of 1862 has been the subject of much discussion in the English Courts and eminent judges have expressed divergent views as to what a Certificate of Incorporation is conclusive of. It is not for us, in my opinion, to say which of those views has the weight of authorities in support of it. Our duty is, in the words of Lord Halsbury, L.C., in *Salomon v. Salomon and Co.* (1), to look at what the Act itself has determined. The sole guide must be the Act itself. The Act says that the certificate shall be conclusive evidence, "that all the requisitions of the Act in respect of registration have been complied with." In my opinion we cannot say that the certificate is conclusive as to requirements of the Act other than those as to registration having been complied with. I cannot agree that subscription in respect of registration by seven or more persons is one of the requisitions of the Act. The fact that the British Legislature in 1900 passed another Act, (63 and 64 Vict., c. 48), making a Certificate of Incorporation conclusive not only of registration but of matters precedent and incidental thereto having been complied with, appears to me to lend weight to the view, that notwithstanding judgments of some learned judges that under the original Act the certificate was conclusive for all purposes, this view was open to doubt.

"The Indian Legislature has not as yet adopted provisions similar to those of section 1 of the Companies' Act, 1900. If the certificate as to the

(1) [1897] A. C. 22.



defendant Company in this case is not conclusive as to matters precedent and incidental to the registration of the Memorandum, there can, in my opinion, be no question that the requirement of section 6 of the Indian Companies' Act, that seven persons must sign a Memorandum of Association in order to form a company was not complied with in the case of the defendant Company.

"The language plainly means that seven separate persons must sign the Memorandum and it is not complied with by one person signing his name twice or more times in different capacities. It was urged that the matter was res-judicata in consequence of previous litigation, but in regard to this I agree with the view of the learned Judge who heard the suit."

The appeal was, therefore, allowed and a decree was made in favour of the plaintiffs.

On this appeal,

*Buckmaster, K.C., J. W. McCarthy and H. E. Wright*, for the appellants, contended that the Company was duly incorporated inasmuch as the signatures by the guardian to the memorandum of Association for the five minors, counted not as one signature but as five. The signatures of the guardian on behalf of the minors were acts authorised by the order of the Court appointing him, and were valid and binding, and were in any case within the powers of the guardian; and the five signatures by the guardian in different legal capacities were separate, and valid signatures, and, with the other two signatures, satisfied the requirements of the Companies Act (VI of 1882). The case was instanced of a man with seven different powers of attorney for seven different persons, and signing his name seven times, each signature representing a different person, as being a somewhat similar case where the signatures would represent not one only but seven persons. But even if it were not so, the certificate of incorporation was in law final and conclusive as to the regularity and validity of all antecedent acts and proceedings in the

1912

MOOSA  
GOOLAM  
ARIEF  
v.  
EBRAHIM  
GOOLAM  
ARIEF.

1912

MOOSA  
GOOLAM  
ARIFF  
v.  
EBRAHIM  
GOOLAM  
ARIFF.

formation and constitution of a Company, and the Court, it was submitted, had no jurisdiction to go behind the certificate to examine into such acts and proceedings. The certificate gave power to trade and carry on all the business of the Company, which could not go on if the regularity of its constitution and formation were liable to be upset. Sections 6, 11, 40 and 41 of the Companies Act, 1882, were referred to. Section 6 of the Act showed, by the use of the word "otherwise," that "subscribing their names" by the proposed members of the Company was one of "the requisitions of the Act in respect of registration." By section 40 their competence to contract was not within the duty of the Registrar to inquire into. Then section 41, by the last paragraph made the "certificate of incorporation conclusive evidence that all the requisitions of this Act in respect of registration have been complied with." Reference was made to *In re Barned's Banking Company*. *Peel's Case* (1): *Oakes v. Turquand* (2): *In re Hertfordshire Brewing Company* (3): *In re Nassau Phosphate Company* (4): *In re National Debenture and Assets Corporation* (5): *Ladies' Dress Association v. Pulbrook* (6): *In re Laxon* (7); and *In re Northumberland and Durham Banking Company* (8). The English Companies' Consolidation Act 1900 (63 and 64 Vict. c. 48) set the matter at rest, section 1 clause (1) of that Act making the certificate of incorporation conclusive in all respects thereby, it was submitted, affirming the law as it then stood: and it has since been confirmed in the later Act of 1908 (8 Edw. VII c. 69, s. 17).

(1) (1867) L. R. 2 Ch. App. 674, 680.

(5) [1891] 2 Ch. 505, 517, 519.

(2) (1867) L. R. 2 E. & Ir. Ap. 325,  
354, 369.

(6) [1900] 2 Q. B. 376.

(7) [1892] 3 Ch. 555.

(3) (1874) 43 L. J. N. S. Ch. 358.

(8) (1858) 2 De Gex &amp; Jones 357:

(4) (1876) L. R. 2 Ch. D. 610.

44 R. R. 1028.

It was also contended that the matters in issue in this suit were *res judicata*, because the matters which were the respondent's ground of attack in the present suit might and ought to have been made a ground of attack in the former suit (146 of 1902), and therefore must, under the Civil Procedure Code 1882 section 13 explanation 2, be deemed to have been a matter directly and substantially in issue in that suit which was decided against the respondent. The suit was also barred by the withdrawal of the miscellaneous proceeding 68 of 1904; and also by section 12 of the Civil Procedure Code as having been instituted during the pendency (in the Privy Council) of the appeal in the former suit, and without the leave of the Court, which should have been, obtained. Reference was made to sections, 42, 43 and 647 of the Civil Procedure Code 1882. The children must obtain the property in suit; the only question was whether they were to have it under the deeds of 1902 which were unchallenged or to take it in the far more convenient form of shares in the Company.

*Bailhache K. C.* and *Herbert G. Snowden*, for the respondents, contended that the Memorandum of Association of the Company had not been signed by seven or more persons as provided by section 6 of the Indian Companies' Act (VI of 1882), and the Company was therefore not duly constituted and did not exist at the time of its purported registration, inasmuch as it did not consist of seven associated persons. Before the certificate of the Registrar could be conclusive the conditions of section 6 of the Act must be complied with: there must be seven signatures. Here there were seven signatures in fact, but only because one of them, that of the guardian, occurred five times over. The signature of a guardian to a Memorandum of Association purporting to be on behalf of an infant

1912

MOOSA  
GOOLAM  
ARIEFF  
v.  
EBRAHIM  
GOOLAM  
ARIEFF.

1912  
 MOOSA  
 GOOLAM  
 ARIFF  
 v.  
 EBRAHIM  
 GOOLAM  
 ARIFF.

was in law the signature of the guardian only and not that of the ward. The conditions of the Act had therefore not been complied with. Section 192 of the English Act, 1862, which was the same as section 236 of the Indian Act, was referred to. The words of section 40 of the Indian Act as to the duty of the Registrar was not in the English Act. The English law in the cases cited did not apply on the question whether the Company was duly constituted: the contract in India was that of the guardian, not of the minor. The Appellate Court was right therefore in holding that the certificate of incorporation was not conclusive as to whether the Company was duly constituted at the time of its purported registration; nor as to whether the Memorandum of Association had been duly signed by the required number of persons; nor as to the competency of a guardian to sign on behalf of an infant, so as to make the latter a contracting party. Reference was made to *In re National Debenture and Assets Corporation* (1): *In re Northumberland and Durham Banking Company* (2): *Oakes v. Turquand* (3): *In re Barnard's Banking Company. Peel's Case* (4) per Lord Cairns: *Princess of Reuss v. Jean Bos* (5) per Lord Cairns: *In re Nassau Phosphate Company* (6): *Baroness Wenlock v. River Dee Company* (7); *Salomon v. Salomon* (8) and *In re Laxon* (9). The inference to be drawn from section 1 cl. (1) of the English Companies Consolidation Act, 1900, and the later Act of 1908, section 17 is that the law was doubtful as to whether the certificate of

(1) [1891] 2 Ch. 505.

(2) (1858) 2 De Gex. E. & Jones 357 :

4 R. R. 1028.

(3) (1867) L. R. 2 E. & Ir. Ap.

325, 346, 353, 367, 375.

(4) (1867) L. R. 2 Ch. App. 674, 681.

(5) (1871) L. R. 5 E. & Ir. App.

176 ; 200.

(6) (1876) L. R. 2 Ch. D. 610.

(7) (1888) L. R. 38 Ch. D. 534.

(8) [1897] A. C. 22.

(9) [1892] 3 Ch. 555.

incorporation was conclusive or not. It was also contended that the matter in the present suit was not *res judicata*. It was not decided in the former case: see the Privy Council decision in *Ibrahim Golam Ariff v. Saiboo* (1). The same kind of relief was not asked for now, as was asked for in the former suit. It was not a question which was bound to be raised in the former suit: nor was the suit barred by reason of the proceedings in the Civil Miscellaneous Petition 68 of 1904 and their withdrawal. Civil Procedure Code, 1882, sections 13, 373 and 647 were referred to.

*Buckmaster K. C.*, in reply. If the contract was, as contended for the respondents, that of the guardian, he need only have signed once; but he could only act as guardian for the five different minors by signing for each of them, which showed that he could only represent them all by signing five times: his signatures being for five different persons should be counted as five. Section 11 of the Companies Act, as to attestation, was the same as in section 6; they are the requisitions wanted: *Oakes v. Tarquand* (2) had been wrongly interpreted for the respondents. As to *res judicata* the words of the Act (section 13, Explanation 2) must be strictly adhered to. If the issue could have been raised, and was not, there was a *res judicata* with respect to it. The respondents thought it did arise as they put it forward on appeal: they did not, as they might have done, get the issues amended, and not having done that, all the Judges said it could not be raised, not having been taken in the lower Courts.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The Record in this case is more than ordinarily confused and the story is somewhat complicated. But for the purpose of this

(1) (1907) I. L. R. 35 Calc. 1. (2) (1867) L. R. 2 E. & Ir. App. 325.

1912

MOOSA  
GOOLAM  
ARIFF  
v.  
EBRAHIM  
GOOLAM  
ARIFF.

June 26.

1912

MOOSA  
GOOLAM  
ARIFF  
v.  
EBRAHIM  
GOOLAM  
ARIFF.

appeal the material facts may be stated in a few sentences.

One, Hadjee Goolam Ariff, a wealthy Mahomedan merchant residing at Rangoon, being dissatisfied with the conduct of his two elder sons was minded to dispose of the bulk of his property for the benefit of his two junior wives and his five younger children, who were all minors at the time. With this object he applied for and obtained five separate orders under the Act of 1890 for the appointment of one and the same person as guardian of each of his minor children in order that the children by their guardian might accept the benefits which he intended to confer upon them. Being also desirous that his property should remain in one mass, intact and undistributed, he procured the registration of a limited Company called the Goolam Ariff Estate Company, Limited. To this Company in return for shares there was transferred so much of his property as was retained by him together with the undivided shares in his estate which he had conveyed to his junior wives and his minor children.

Hadjee Goolam Ariff died on the 15th of May 1902, having made his will on the 19th of the previous month. It was proved by his eldest son, Ebrahim Goolam Ariff, one of the executors therein named on the 23rd of June 1902. From that time to the present there has been continuous and persistent litigation in which Ebrahim Goolam Ariff has endeavoured to set aside the disposition which his father made. In all these attempts Ebrahim Goolam Ariff failed except in his appeal in the present suit to the Chief Court of Lower Burma. On that appeal the order was made from which the present appeal to His Majesty has been brought.

The object of the present suit was to have it declared that the Goolam Ariff Estate Company,

Limited, was not duly incorporated and that the property conveyed to the Company should be transferred "to the persons entitled to the same." The validity of the conveyances to the testator's junior wives and his minor children had been established in a suit, No. 146 of 1902, which ultimately came before this Board. But the validity of the incorporation of the Company had not been expressly determined.

1912  
MOOSA  
GOOLAM  
ARIEFF  
v.  
EBRAHIM  
GOOLAM  
ARIEFF.

The main grounds of defence to the present suit were—

(i) that the certificate of incorporation of the Company was conclusive; and

(ii) that the question raised by the suit was "*res judicata*."

The questions framed to meet these points were both answered by the Court of Appeal in favour of the plaintiffs. In their Lordships' opinion both ought to have been answered in favour of the defendants, who are the present appellants.

In dealing with the first question their Lordships will assume that the conditions of registration prescribed by the Indian Companies Act were not duly complied with, that there were not seven subscribers to the memorandum of association, and that the Registrar of Companies ought not to have granted a certificate of incorporation. As a matter of fact a certificate of incorporation was granted. In their Lordships' opinion the certificate of incorporation is conclusive for all purposes.

The provisions of the Indian Companies Act of 1882 as regards the incorporation of companies are the same as those contained in the Imperial Act of 1862, except that it is specially provided in section 40 of the Indian Act that it is not the duty of the Registrar to require evidence as to whether the subscribers to the memorandum are competent to contract.

1912

MOOSA  
GOOLAM  
ARIFF  
v.

EBRAHIM  
GOOLAM  
ARIFF.

Probably this provision was introduced because according to the Indian Law the contract of an infant is not voidable but void, and it would lead to endless confusion and expense if the Registrar were to take upon himself the duty of ascertaining whether the signatories to the memorandum were or were not of full age.

In England the question whether the Registrar's certificate is conclusive was decided so far back as 1867 by Lord Cairns sitting in the Court of Appeal. In *Peel's Case* (1) after signature and before registration a proposed memorandum of association had been altered without the authority of the subscribers so materially that in the words of Lord Cairns, "the alteration entirely neutralised and annihilated the original execution and signature of the document." The Company, however, was registered and the Registrar gave his certificate of incorporation. It was objected that the memorandum of association had not been signed by seven or indeed by any subscribers and that the provisions of the Act had not been complied with. To that proposition Lord Cairns assented. But "the certificate of incorporation," he said, "is not merely a *prima facie* answer, but a conclusive answer to such objection. . . . When once the certificate of incorporation is given nothing is to be enquired into as to the regularity of the prior proceedings." That was a plain and direct decision on the point. The observations of Lord Chelmsford in *Oakes v. Turquand* (2), are to the same effect. "I think," said his Lordship, "that the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive in this case that all previous requisites had been complied with."

(1) (1867) L. R. 2 Ch. 674.

(2) (1867) L. R. 2 E. & I. Ap. 325.



Undoubtedly Lord Cairns' decision has been cavilled at. For instance in *In re National Debenture Corporation* (1), a Judge of first instance declined to treat a certificate of incorporation as conclusive which had been as was supposed subscribed by six persons only. On appeal, however, further evidence was admitted and it was found that the memorandum had in fact been subscribed by seven persons. On that ground the Court of Appeal reversed the decision appealed from. But unfortunately the learned Judges of Appeal made some observations to the effect that if the learned Judge had been right as to the facts his decision in point of law would have been correct. These observations were mere dicta and besides the Court of Appeal could have had no jurisdiction to reverse Lord Cairns' decision. In their Lordships' opinion that decision is of unquestionable authority untouched by any subsequent decision and unimpaired by any dictum in any Superior Court, although the Legislature thought fit, no doubt for good reasons, to set the matter at rest by the Imperial Act of 1900, which put the words of Lord Cairns and Lord Chelmsford in a legislative enactment repeated in the Imperial Act of 1908.

Their Lordships are prepared to go further and to say that, in their opinion, even if there were no authority to guide their decision, the matter would seem to them to be absolutely plain on the words of the Act. The use of the word "otherwise" in section 6 shows that the statutory condition that the memorandum of association must be signed by seven persons is as much a condition of registration as any other requisition to be found in the Act which is preliminary to registration, and apparently essential.

This view is sufficient to determine the case in favour of the appellants, but inasmuch as the question

1912

MOOSA  
GOOLAM  
ARIEFF  
v.  
EBRAHIM  
GOOLAM  
ARIEFF.

(1) [1891] 2 Ch. 505.

1912

MOOSA  
GOOLAM  
ARIFF  
v.  
EBRAHIM  
GOOLAM  
ARIFF.

Probably this provision was introduced because according to the Indian Law the contract of an infant is not voidable but void, and it would lead to endless confusion and expense if the Registrar were to take upon himself the duty of ascertaining whether the signatories to the memorandum were or were not of full age.

In England the question whether the Registrar's certificate is conclusive was decided so far back as 1867 by Lord Cairns sitting in the Court of Appeal. In *Peel's Case* (1) after signature and before registration a proposed memorandum of association had been altered without the authority of the subscribers so materially that in the words of Lord Cairns, "the alteration entirely neutralised and annihilated the original execution and signature of the document." The Company, however, was registered and the Registrar gave his certificate of incorporation. It was objected that the memorandum of association had not been signed by seven or indeed by any subscribers and that the provisions of the Act had not been complied with. To that proposition Lord Cairns assented. But "the certificate of incorporation," he said, "is not merely a *prima facie* answer, but a conclusive answer to such objection. . . . When once the certificate of incorporation is given nothing is to be enquired into as to the regularity of the prior proceedings." That was a plain and direct decision on the point. The observations of Lord Chelmsford in *Oakes v. Turquand* (2), are to the same effect. "I think," said his Lordship, "that the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive in this case that all previous requisites had been complied with."

(1) (1867) L. R. 2 Ch. 674.

(2) (1867) L. R. 2 E. & I. Ap. 325.

Undoubtedly Lord Cairns' decision has been cavilled at. For instance in *In re National Debenture Corporation* (1), a Judge of first instance declined to treat a certificate of incorporation as conclusive which had been as was supposed subscribed by six persons only. On appeal, however, further evidence was admitted and it was found that the memorandum had in fact been subscribed by seven persons. On that ground the Court of Appeal reversed the decision appealed from. But unfortunately the learned Judges of Appeal made some observations to the effect that if the learned Judge had been right as to the facts his decision in point of law would have been correct. These observations were mere dicta and besides the Court of Appeal could have had no jurisdiction to reverse Lord Cairns' decision. In their Lordships' opinion that decision is of unquestionable authority untouched by any subsequent decision and unimpaired by any dictum in any Superior Court, although the Legislature thought fit, no doubt for good reasons, to set the matter at rest by the Imperial Act of 1900, which put the words of Lord Cairns and Lord Chelmsford in a legislative enactment repeated in the Imperial Act of 1908.

Their Lordships are prepared to go further and to say that, in their opinion, even if there were no authority to guide their decision, the matter would seem to them to be absolutely plain on the words of the Act. The use of the word "otherwise" in section 6 shows that the statutory condition that the memorandum of association must be signed by seven persons is as much a condition of registration as any other requisition to be found in the Act which is preliminary to registration, and apparently essential.

This view is sufficient to determine the case in favour of the appellants, but inasmuch as the question

1912

MOOSA  
GOOLAM  
ARIFF  
v.  
EBRAHIM  
GOOLAM  
ARIFF.

(1) [1891] 2 Ch. 505.

1912

MOOSA  
GOOLAM  
ARIFF  
v.

EBRAHIM  
GOOLAM  
ARIFF.

of *res judicata* was very fully argued their Lordships do not think it right to abstain from dealing with it.

Section 13 of the Code of Civil Procedure of 1882 enacts that :—

“ No Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. ”

Then Explanation 2 of that section declares that :—

“ Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

It was admitted by the learned counsel for the respondents that the alleged invalidity of the incorporation of the Goolam Ariff Estate Company, Limited, might have been made a ground of attack in the suit No. 146 of 1902, in which the validity of the dispositions made by Hadjee Goolam Ariff was attacked.

That it ought to have been made a ground of attack in that suit appears to their Lordships to be equally clear. All the facts on which the present suit is based were known to the plaintiff and are stated at length in the proceedings of the former suit. No further evidence would have been needed. Nothing was wanting but the addition of an issue on the point. The case is plainly within the ruling of this Board in the case of *Kameswar Pershad v. Rajkumari Ruttan Koer*. (1)

Their Lordships therefore think that the question raised in the present suit is *res judicata*, and on that ground as well, as on the ground that the certificate of incorporation is conclusive, their Lordships think that the suit fails and ought to be dismissed.

Their Lordships are, therefore, of opinion that the appeal ought to be allowed and the suit dismissed with costs both here and below, and their Lordships will humbly advise His Majesty accordingly.

*Appeal allowed.*

Solicitors for the appellants: *Bramall & White.*

Solicitors for the respondents: *A. H. Arnould & Son.*

J. V. W.

### PRIVY COUNCIL.

RANGOON BOTATOUNG COMPANY, LD.

*v.*

THE COLLECTOR, RANGOON.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA, AT RANGOON.]

*Appeal to Privy Council—Right of appeal—Proceedings on award by Collector under Land Acquisition Act (I of 1894)—Decision of Court of Lower Burma on reference by Collector of Rangoon—Question as to value of land a matter for local judicial tribunals.*

No appeal lies to His Majesty in Council from a decision of the Chief Court of Lower Burma on a reference to that Court by the Collector of Rangoon, in proceedings under the Land Acquisition Act (I of 1894), on an award made by him as to the value of land acquired.

A right of appeal must be given by express enactment, and cannot be implied.

*Sandbach Charity Trustees v. North Staffordshire Railway Co.*(1), per Lord Bramwell, followed.

The question in this case, moreover, being only a question of fact as to the value of land acquired under the Act, was, in the opinion of their Lordships, one for decision by local arbitrators or Courts, and not a matter for determination by a judicial tribunal in England.

<sup>c</sup>*Present*: LORD MACNAGHTEN, LORD SHAW, SIR JOHN EDGE, AND MR. AMEER ALI.

1912

MOOSA  
GOOLAM  
ARIFF

*v.*

EBRAHIM  
GOOLAM  
ARIFF.

*P.C.*<sup>s</sup>

1912

*June 26 ;  
July 16.*

1912  
RANGOON  
BOTATOUNG  
COMPANY,  
LD.  
v.  
THE  
COLLECTOR,  
RANGOON.

APPEAL from a decision (11th May 1908) of the Chief Court of Lower Burma confirming an award of compensation made by the Collector under the Land Acquisition Act (I of 1894).

The claimants to compensation were the appellants to His Majesty in Council.

This appeal (stated in the appellant's case to be from an "award") arose of the compulsory acquisition of certain lands in the Botatoung quarter of Rangoon, belonging to the Appellant Company, by the Local Government under the Land Acquisition Act. After a very lengthy inquiry the Collector awarded compensation to the appellants amounting in all to Rs. 13,25,720. The area of the Botatoung property was 10.48 acres, and the value was assessed on the basis of Rs. 1,10,000 per acre, amounting to Rs. 11,52,800, together with the statutory allowance of 15 per cent. (Rs. 1,72,920), to which the appellants were entitled under section 23, sub-section 2 of the Act.

The Revenue Department notification preliminary to acquiring the land was published in the Burma Gazette of 3rd March 1906 pursuant to section 6 of the Act. The appellants did not accept the award, and applied for a reference under the Act to the Chief Court of Lower Burma, the only question for that Court to decide being, as the Court itself said, "the market value of the lands at the date of the publication of the notification."

The Chief Court (HARTNOLL and ROBINSON JJ.) on the reference confirmed the Collector's award; and the appellants thereupon obtained leave from the Chief Court to appeal, to His Majesty in Council.

On this appeal, the objection was taken in the respondent's printed case that no appeal lay.

*Bailhache, K.C., Sankey, K.C., and Dr. Arnold Jolly*, for the appellants, contended that the appeal

would lie as of right. The Land Acquisition Act (I of 1894), section 54, enacted that an appeal lies to the High Court "in any proceedings under this Act." That would be subject of course to the discretionary right of the Court to refuse appeals in certain cases. Reference was made to the Civil Procedure Code (Act XIV of 1882), section 595, and Civil Procedure Code (Act V of 1908), section 109, giving a right of appeal from the High Courts to the Privy Council. The Chief Court of Lower Burma is, in respect of appeals to England, in the same position as a High Court. Appeals have been entertained by this Board under the Land Acquisition Acts: see *Ezra v. Secretary of State for India* (1), *Secretary of State for India v. India General Steam Navigation Company* (2), and *Secretary of State for Foreign Affairs v. Charlesworth, Pilling and Company* (3), per Lord Hobhouse. There may be an appeal on a question of fact. Under these circumstances, it was for the respondent to show that the right of appeal had been taken away, and that the appeal did not lie.

*Buckmaster, K.C.*, and *Charles H. Sargant*, for the respondent, contended that no appeal lay, unless it was expressly given by the Land Acquisition Act, and no right of appeal to His Majesty in Council, it was submitted, existed under Act I of 1894. The point had not been raised before in any of the cases. The Act did nothing but "award" compensation for land. Under the provisions of the Act the determination of the Court established by it was both in name and in fact and "award," and (apart from the special provisions of the Act) was not appealable to any greater extent than the award of any other tribunal of arbitration.

(1) (1905) I. L. R. 32 Calc. 605; (2) (1909) I. L. R. 36 Calc. 967, 974 :  
L. R. 32 I. A. 93. L. R. 36 I. A. 200, 202.

(3) [1901] A. C. 373, 391; L. R. 28 I. A. 121, 139.

1912  
 RANGOON  
 BOTATOUNG  
 COMPANY,  
 LD.  
 v.  
 THE  
 COLLECTOR,  
 RANGOON.

If the amount awarded in the Collector's Court was not satisfactory, the award came before another Court which made another award: section 3, sub-sections (b) and (d) were referred to. The procedure all shows that the proceedings were not the proceedings of a Court at all. No "order" or "decree" but merely an "award" was made: sections 18, 21, 23, 24 and 25 were referred to. A reference was allowed to another Court, but this was to be dealt with in a special way, and its result is an "award," not an "order" or "decree." Sections 31, 51 and 52 were referred to, it being pointed out that there was no fee or duty under section 51. Section 53 made the Civil Procedure Code applicable to all proceedings, "save in so far as they may be inconsistent with anything contained in the Act." Section 54 gives an appeal to the High Court from the "award" which is the only appeal given and that was a limited one, and did not in terms extend beyond the High Court, the express provision of this limited right negating by inference the existence of any general right of appeal. Section 54 would have been unnecessary, had it been intended that the ordinary procedure as to appeals under the Civil Procedure Code should apply. Under section 109 of the Civil Procedure Code of 1908, an appeal to this Board must be from a "decree" or "order"; that section is more extensive than section 595 of the Civil Procedure Code of 1882 in which the word "order" did not occur. The claimant here is not a "suitor," but a person whose land has been legally acquired by Government. The present appeal was against the "award," and no appeal lies from that to this Board. Reference was made to *In re Arbitration between Sandback Charity Trustees and North Staffordshire Railway Company* (1): *Ex parte County Council of Kent and Councils of Dover*

(1) (1877) L. R. 3 Q. B. D. 1, 3.



*and Sandwich* (1) a case under section 29 of the Local Government Act, 1888 (51 and 52 Vict. C. 41): *In re Arbitration between Knight and the Tabernacle Permanent Building Society* (2): *Burgess v. Morton* (3). Appellate jurisdiction which a person was entitled to invoke must, it was submitted, have reference to an appeal expressly given by the particular statute under which the procedure has been taken. In this particular case, moreover, the question is one of fact and not of law, and has been carefully and exhaustively dealt with by a Court which had, on the request of the parties; visited and inspected the land acquired, and the determination of the Court could not be advantageously reviewed by this Board.

*Bailhache, K.C.*, in reply, agreed that the right of appeal, if there was one, must be found in the statute under which these proceedings had been taken. It was submitted, however, that, after the hearing by the Chief Court on the reference, that Court made a "decree" or "order" from which an appeal lay to this Board. [LORD MACNAGHTEN. How do you get the Civil Procedure Code to apply?] Section 53 of Act I of 1894 makes the Code of Civil Procedure applicable. Section 109 of the Code of 1908 gives an appeal to this Board from the "decree" or "order" of the Chief Court. The appellant had a right of appeal to the Chief Court under section 54 of Act I of 1894. In the Chief Court he got out of the region of "awards," and came to a stage of the case which ended in the "order" or "decree" of the Chief Court. That Court gave a "judgment" in the case, not an "award."

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In this case a preliminary objection was taken to the appeal. Having heard the

1912  
RANGOON  
BOTATOUNG  
COMPANY,  
LD.  
v.  
THE  
COLLECTOR,  
RANGOON.

July 16.

(1) [1891] 1 Q. B. 725, 726, 727. (2) [1892] 2 Q. B. 613, 617.

(3) [1896] A. C. 136, 141.

1912

RANGOON  
BOTATOUNG  
COMPANY,  
LD.v.  
THE  
COLLECTOR,  
RANGOON.

point fully argued, their Lordships came to the conclusion that the appeal was incompetent, and they intimated that on that ground they would humbly advise His Majesty that the appeal should be dismissed with costs.

The appeal purported to be an appeal as of right from an award of the Chief Court of Lower Burma. Some land belonging to the appellants had been taken for public purposes under the provisions of the Land Acquisition Act, 1894. In due course the Collector made his award. The appellants did not accept it. They were dissatisfied with the amount of the Collector's valuation. On that ground, and on that ground only, they demanded, as they were entitled to do, that the matter should be referred to the Court under the provisions of the Act. The expression "the Court" in the Act is defined as meaning "a principal Civil Court of Original Jurisdiction." The reference was taken by two Judges of the Chief Court. They sat as "the Court" and also as the High Court to which an appeal is given by the Act from the award of "the Court." The hearing of the reference occupied 45 days. More than 100 witnesses were examined. A vast mass of documents was put in, and the learned Judges at the request of the parties viewed the premises. Then they made an exhaustive award dealing minutely with the evidence, and they held that the award of the Collector had given the appellants "all and probably more than the full market-value of their property," and so they dismissed the reference with costs. They were precluded by the Act from awarding less than the amount awarded by the Collector.

It was admitted by the learned counsel for the appellants that it was incumbent upon him to show that there was a statutory right of appeal. As Lord

Bramwell, then Bramwell J.A., observed in the case of the *Sandback Charity Trustees v. The North Staffordshire Railway Company* (1): "An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment." A special and limited appeal is given by the Land Acquisition Act from the award of "the Court" to the High Court. No further right of appeal is given. Nor can any such right be implied. The learned Counsel for the appellants relied both on section 53 and section 54 of the Act. Section 53 enacts that, "save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act." That enactment applies to an earlier stage in the proceedings, and seems to have nothing to do with an appeal from the High Court. Section 54 is in the following terms:—

"54. Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act."

That section seems to carry the appellants no further. It only applies to proceedings in the course of an appeal to the High Court. Its force is exhausted when the appeal to the High Court is heard. Their Lordships cannot accept the argument or suggestion, that when once the claimant is admitted to the High Court, he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction.

1912

RANGOON  
BOTATOUNG  
COMPANY,  
LD.  
v.  
THE  
COLLECTOR,  
RANGOON.

(1) (1877) L. R. 3 Q. B. D. 1.

1912

RANGOON  
BOTATOUNG  
COMPANY,  
LD.  
THE  
COLLECTOR,  
RANGOON.

It is impossible to conceive anything more inconvenient than that a Court in this country should be called upon to review the determination of arbitrators as to the value of a piece of land in India—a mere question of fact—without the advantage of any local knowledge or the privilege, if it be a privilege, of seeing the cloud of witnesses who engaged the attention of two Judges of the Chief Court of Lower Burma for 45 days, or even the opportunity and the interest of viewing a property the value of which seems so extraordinarily difficult to discover.

*Appeal dismissed.*

Solicitors for the appellants: *A. H. Arnould & Son.*

Solicitors for the respondent: *Coward & Hawksley, Sons & Chance.*

J. V. W.

## APPELLATE CIVIL.

Before Justice Sir Richard Harington and Justice Sir Asutosh  
Mookerjee.

PARBATI DEBI.

v.

MATHURA NATH BANERJEE.\*

1912

Jan. 12.

*Enhancement of rent—Bengal Tenancy Act (VIII of 1885) s. 30—Landlord of a holding, meaning of—Res judicata—Civil Procedure Code (Act XIV of 1882) s. 13—Matter directly and substantially in issue, what constitutes.*

The plaintiff and the defendants were howladars of a property. The defendants took a raiyati lease from the plaintiff of his undivided share of the howla. Upon a suit brought by the plaintiff under s. 30 of the Bengal Tenancy Act for enhancement of rent against the defendant :—

*Held*, that the plaintiff was not the landlord of a “holding” within the meaning of s. 30 of the Act, and as such the suit was liable to be dismissed.

*Haribole Brohmo v. Tasimuddin Mondul* (1) followed.

In a previous suit between the parties for enhancement of rent it was decided that the plaintiff had the right to enhance the rent of the defendants ; but the suit was dismissed on the ground that the rent paid by the defendants, was not lower than the rate at which rent was paid by tenants of adjoining lands. In a subsequent suit between the same parties, the question was raised by the plaintiff that his right to enhance the rent of the defendants was *res judicata*.

*Held*, that inasmuch as the decision upon the question of the right of the plaintiff to enhance the rent was not the basis of the decree ultimately made in the previous suit, it was not *res judicata* between the parties.

\* APPEAL from Appellate Decree, No. 1421 of 1910, against the decree of Umesh Chandra Sen, Subordinate Judge of Dacca, dated Jan. , 1919, affirming the decree of Sayidur Rahman, Munsif of Maushiganj dated July 27, 1909.

(1) (1898) 2. C. W. N. 680.

1912

PARBATI  
DEBI  
v.  
MATHURA  
NATH  
BANERJEE.

SECOND APPEAL by Parbati Debi, the plaintiff.

This appeal arose out of an action brought by the plaintiff for recovery of arrears of rent and enhancement of rent under section 30 of the Bengal Tenancy Act. The plaintiff's allegation was that she was the proprietor of a six annas share of a howla, and the defendants of the remaining ten annas share; that the defendants took a raiyati, lease of her undivided share of the howla; that the rent of the raiyati holding held by the defendants was liable to enhancement on the ground of its being below the prevailing rate paid by the tenants of the adjoining lands.

The defendants pleaded, *inter alia*, that the suit was not maintainable at the instance of the plaintiff, who was only a co-sharer landlord, that the rent was not liable to enhancement and that the provisions of section 30 of the Bengal Tenancy Act were not applicable to the case.

It appeared that the plaintiff brought a suit previously against the defendants for enhancement of rent, which was dismissed on the ground that the rent paid by the tenants (defendants) was not lower than the rate at which rent was paid by the tenants of the adjoining lands; but in that suit it was decided that the plaintiff had the right to enhance the rent.

The Court of first instance gave effect to the objection of the defendants and decreed the plaintiff's suit partially, at the rate admitted by the defendants. On appeal, the decision of the first Court was affirmed by the learned Subordinate Judge. Against this decision the plaintiff appealed to the High Court.

*Babu Harendra Narayan Mitter*, for the appellant. The question whether the rent is enhanceable or not, is *res judicata* between the parties. In a previous suit between the parties this question was

raised and finally decided. The case of *Peary Mohun Mukerjee v. Ambica Churn Bandopadhyaya* (1) supports my contention. The Court below was wrong in law in holding that s. 30 of the Bengal Tenancy Act did not apply to the case. The plaintiff was the landlord of the holding within the meaning of the section. The introductory words of s. 3 of the Bengal Tenancy Act say that "unless there is something repugnant in the subject or context" holding means a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy. Section 30 of the Act says the landlord of a "holding" held at a money rent may institute a suit for enhancement. The definition of holding as given in the Act is repugnant to section 30 of the said Act. The definitions of "raiyat" and "rent" show that a raiyat may hold a share of a parcel of land for which he may be liable to pay rent to the landlord. That being so section 30 of the Bengal Tenancy Act would be applicable to the facts of the present case.

*Babu Ramesh Chunder Sen*, for the respondent, was not called upon,

HARINGTON J. This is an appeal by the plaintiff whose suit for enhancement of rent has been dismissed by both the Courts of first instance and the lower Appellate Court. The facts are that the plaintiff and the defendants are howladars, the plaintiff having six annas of the howla and the defendants ten annas. The defendants took the undivided six annas of the howla from the plaintiff as his tenants and this in respect of this undivided six annas of the howla that the plaintiff seeks to obtain an enhancement of rent. The Munsif and the learned Judge of the lower Appellate Court held that the plaintiff was not in respect of this

1912  
PARRATI  
DEBI  
v.  
MATHURA  
NATH  
BANERJEE.

1912

PARBATI  
DEBI  
v.MATHURA  
NATH  
BANERJEE.HARINGTON  
J.

undivided six annas the landlord of a holding held at a money rent by an occupancy raiyat within the terms of section 30 of the Bengal Tenancy Act and on that ground, amongst others, dismissed the suit of the plaintiff.

Now, on behalf of the appellant it is contended, *first*, that this issue has been previously determined in favour of the plaintiff and that therefore under the rule of *res judicata* the Court was not entitled to dismiss his suit on this ground; and, *secondly*, it is argued that the plaintiff was the landlord of a holding within the terms of section 30 of the Bengal Tenancy Act.

Now with regard to the first question, a suit was previously brought, and it was held that in that suit the landlord was entitled to bring his action; but the suit was dismissed on the ground that the rent which it was sought to enhance was not lower than that of the surrounding lands. Therefore, judgment was given in favour of the defendants, although the defendants' objection to the competency of the suit was in fact overruled. In my opinion, the rule of *res judicata* does not apply to such cases. The judgment was passed in favour of the defendants and it was not open to them to appeal against the view of the Munsif who overruled the contention urged by them. If we were to hold that the rule of *res judicata* applied it would come to this that the defendants were bound by the decision of the first Court and were debarred from appealing against the view expressed against them because the decision was in their favour—the principal point which the Court decided against them not being a ground on which the suit was decided because the suit was decided in their favour. The defendants were, therefore, debarred from questioning the soundness of the decision. The rule of



*res judicata* cannot, therefore, be applied to this case.

Then on the second point, what is sought to be enhanced is the rent of an undivided six annas share of the howla and my view is that an undivided six annas is not a holding within the meaning of section 30 of the Bengal Tenancy Act. Under that Act "holding" is defined as a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy. I can understand no process of reasoning by which an undivided six annas can be described as a parcel or parcels of land because the use of the word parcel implies that the land in question has metes and bounds. The result is that an undivided six annas of the howla does not come within the definition of the word "holding" and therefore does not fall within section 30 of the Bengal Tenancy Act. The case is not without authority because the case of *Haribole Brohmo v. Tasimuddin Mondul* (1) is a case in which this very same question arose and there it was decided that an undivided 8 annas share was not itself a holding under section 30 of the Bengal Tenancy Act. On a consideration of the statute and the authority it seems to me that the appeal ought not to succeed. It is conceded that there is no authority in support of the interpretation which the appellant wants to put on the statute; and it is a very significant fact, as my learned brother points out, that although the decision in the case of *Haribole Brohmo v. Tasimuddin Mondul* (1) was given so far back as 1898 there is no subsequent amendment of the Act so as to, in any way, derogate the effect of that decision.

For these reasons, I hold that the decree of the lower Court ought to be affirmed and this appeal dismissed with costs.

1912

PARBATI  
DEBI

v.

MATHURA  
NATH  
BANERJI.HARINGTON  
J.

(1) (1898) 2. C. W. N. 680.

1912

PARBATI  
DEBI  
v.  
MATHURA  
NATH  
BANERJEE.

MOOKERJEE J. I desire to add a few observations, in view of the earnest endeavour made to upset what has been accepted as good law for at least 15 years.

The plaintiff and the defendants are howladars of a property; the share of the plaintiff is six annas and that of the defendants ten annas. The defendants have taken a raiyati lease from the plaintiff of his share of the property. The plaintiff now seeks, under section 30 of the Bengal Tenancy Act, to enhance the rent payable by the defendants. The Courts below have dismissed the suit. This decision is sought to be assailed by the plaintiff, appellant before this Court, on two grounds; namely, *first*, that the question of his right to enhance the rent of the defendants is *res judicata*; and, *secondly*, that upon a true construction of section 30 of the Bengal Tenancy Act, he has a right to enhance the rent of the defendants.

In support of the first contention, reference has been made to the decision in the earlier litigation between the parties when the plaintiff fruitlessly endeavoured to enhance the rent payable by the defendants. In that suit, it was decided in favour of the plaintiff that he had the right to enhance the rent of the defendants; but the suit was dismissed on the ground that the rent paid by the defendants was not lower than the rate at which rent was paid by tenants of adjoining lands. It has been argued on the authority of the case of *Peary Mohun Mukerjee v. Ambica Churn Bandopadhyaya* (1), that the decision in favour of the plaintiff upon the question of his right to enhance the rent is concluded by the judgment mentioned. That case, however, is clearly distinguishable. There it was ruled that when a

(1) (1897) I. L. R. 24 Calc. 900.

decision has been based on two grounds either of which is sufficient to support the decree, the decision upon each of the grounds is conclusion between the parties. Here, however, the decision upon the question of the right of the plaintiff to enhance the rent is not the basis of the decree ultimately made. Consequently, it cannot be maintained under section 13 of the Code of Civil Procedure of 1882 that the question was directly and substantially in issue between the parties or was finally decided. This view is in accord with that taken in the case of *Thakur Magundeo v. Thakur Mahadeo Singh* (1). The first ground upon which the decision of the Court below is sought to be assailed cannot, therefore, be supported.

In support of the second ground, it has been contended that although the defendants held a share of the howla under the plaintiff, yet the plaintiff is the landlord of a "holding" within the meaning of section 30 of the Bengal Tenancy Act. Now the term "holding" as defined in clause (9) of section 3 of the Act means a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy. Stress is laid, however, by the appellant on the introductory words of the section which provide that the definitions given are to apply unless there is something repugnant in the subject or context. But it has not been shown to us that there is anything in section 30 repugnant to the definition of the term "holding" given in clause (9) of section 3 of the Act. On the other hand, the cases of *Hari Charan Bose v. Runjit Singh* (2), *Baidya Nath De Sarkar v. Ilim* (3), *Haribole Brohmo v. Tasimuddi Mondul* and *Ahadulla v. Gagan* (4), conclusively show that an undivided share in a parcel or parcels of land cannot be a "holding". In

1912

PARBATI  
DEBIr.  
MATHURA  
NATH  
BANERJEE.MOOKERJEE  
J.

(1) (1891) I. L. R. 18 Calc. 647. (3) (1897) I. L. R. 25 Calc. 917.

(2) (1896) I. L. R. 25 Calc. 917 n. (4) (1902) 2 C. L. J. 10.

1912  
 PARBATI  
 DEBI  
 v.  
 MATHURA  
 NATH  
 BANERJEE.  
 MOOKERJEE  
 J.

fact a parcel of land is land defined by metes and bounds and consequently a share in a parcel of land cannot be deemed to be a parcel of land within the meaning of the definition of the term "holding". Reference has finally been made to the terms of section 5, clause (2) and section 3, clause (5) of the Bengal Tenancy Act, where definitions are given of the terms "raiyat" and "rent" respectively, and it has been pointed out that a raiyat may hold a share of a parcel of land for which he may be liable to pay rent to the landlord. That need not be disputed. But it does not follow that, when a raiyat holds a share in a parcel of land, he has a "holding" as defined in section 3, clause (9). The case of *Jardine, Skinner & Co. v. Rani Surut Soondari Debi* (1), where their Lordships of the Judicial Committee held that a right of occupancy might be acquired in respect of an undivided share of land under the Bengal Rent Law of 1868, and the decision of this Court in *Baidya Nath Mondal v. Sudharam Misri* (2), where a similar view was taken, are clearly of no assistance to the plaintiff, because what he has to establish is that he is the landlord of a "holding" within the meaning of the Bengal Tenancy Act. In my opinion, he has failed to do so.

Both the points urged fail, and the appeal must, therefore, be dismissed with costs.

S. C. G.

*Appeal dismissed.*

(1) (1878) 3. C. L. R. 140.

(2) (1904) 8. C. W. N. 751.

## CIVIL RULE.

*Before Justice Sir Asutosh Mookerjee and Mr. Justice Carnuff.*

HARI MANDAL

*v.*

KESHAB CHANDRA MANA\*

1912

April 12.

*Sanction for prosecution—Application to District Judge under s. 195, cl. (6) of the Criminal Procedure Code (Act V of 1898)—Transfer of such application to a Subordinate Judge for disposal—Jurisdiction—Civil Courts Act (XII of 1887), ss. 21 (2), (4) and 22 (1)—Appeal.*

An application made to a District Judge under s. 195, sub-s. (6) of the Criminal Procedure Code, against the order of a Munsif, cannot be transferred by the District Judge to a Subordinate Judge for disposal.

*Ram Charan Chanda Talukdar v. Taripulla* (1) approved.

*Semle* : An application under s. 195, sub-s. (6) of the Criminal Procedure Code is not an "appeal" within the meaning of s. 22, sub-s. (1) of the Bengal Civil Courts Act, 1887.

RULE granted to the petitioners, Hari Mandal and others.

On the 27th April 1908, an application for compromise was filed on behalf of one Keshab Chandra Mana, the decree-holder, in execution of a decree obtained by him against Hari Mandal and others, the judgment-debtors, in a mortgage suit, and the execution case was ordered by the Munsif to be dismissed on full satisfaction having been entered. Subsequently, on the 20th May 1908, the decree-holder filed a petition under sections 244 and 623 of the Code of Civil Procedure, 1882, to set aside the order of dismissal on the ground that the application for compromise was

\* Civil Rule, No. 5977 of 1911, against the order of Ganendra Nath Mookerjee, Subordinate Judge of Midnapore, dated Aug. 24, 1911.

1912

HARI  
MANDAL  
v.  
KESHAB  
CHANDRA  
MANA.

not filed by him or on his behalf, and he alleged that the said application was forged. On the case having been heard by the Munsif, it was found that the application was a forgery, and it was ordered, on the 9th September 1908, that the order of dismissal in the execution case be set aside. Against this latter order Hari Mandal preferred an appeal, in which the judgment of the Munsif was upheld. Thereupon, Keshab Chandra Mana applied for and, on the 21st January 1911, obtained sanction from the Munsif to prosecute Hari Mandal, one of the judgment-debtors, under sections 193, 196, 463 and 471, Indian Penal Code, and his witnesses under sections 193 and 471 read with section 107, Indian Penal Code, while the other judgment-debtors were ordered to be discharged. Against the Munsif's order granting sanction for prosecution, two appeals were filed before the District Judge who transferred the said appeals to the file of the Subordinate Judge for disposal. On the appeals being dismissed on the 21th August 1911, Hari Mandal and his witnesses applied for and obtained a Rule from the High Court against the order granting sanction to prosecute them.

*Babu Manmatha Nath Mookerjee and Babu Satindra Nath Mukerjee*, for the petitioners, in support of the Rule. The District Judge had no jurisdiction to transfer the case from his file to that of the Subordinate Judge. An appeal from an order under section 195, Criminal Procedure Code, is not such an appeal as is contemplated by section 22(1), Bengal Civil Courts Act, and must be disposed of by the District Judge himself, who alone is the competent authority to deal with such matters. Appeals from the Court of the Munsif ordinarily lie to the Court of the District Judge, and for the purposes of section 195, Criminal

Procedure Code, the Munsif's Court is subordinate to that of the District Judge. This was virtually a petition for revision, though couched in the form of an appeal, and the District Judge was, therefore, the only competent authority to dispose of it.

*Babu Mohini Nath Bose*, for the opposite party, showed cause. The sanction to prosecute the petitioners was granted by the Munsif. The petitioners appealed to the District Judge, who transferred the appeal to the Subordinate Judge for disposal. Under section 22(1) of the Bengal Civil Courts Act (XII of 1887) the District Judge was competent to make this transfer, and the Subordinate Judge was acting within his jurisdiction when he made the order against which this Rule has been obtained.

MOOKERJEE AND CARNDUFF JJ. This Rule raises the question, whether when an application has been made to a District Judge under section 195, sub-section (6), Criminal Procedure Code, the application can be transferred by him to a Subordinate Judge for disposal. Sub-section (6) provides that any sanction given or refused under the section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate. Sub-section (7) then provides that for the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie. Now, section 21, sub-section (2) of the Bengal Civil Courts Act, 1887, provides that an appeal from an order of the Munsif lies to the District Judge. Consequently, the District Judge is the authority competent under sub-section (6) of section 195, Criminal Procedure Code, to revoke or grant a sanction which has been given or refused by a Munsif. The District Judge, in our opinion, is not competent under

1912  
HARI  
MANDAL  
v.  
KESHAB  
CHANDRA  
MANA.

1912  
 HARI  
 MANDAL  
 v.  
 KESHAB  
 CHANDRA  
 MANA.

section 22, sub-section (1) of the Bengal Civil Courts Act, 1887, to transfer the application presented to him, for disposal by the Subordinate Judge. That section provides that a District Judge may transfer to any Subordinate Judge under his administrative control any appeals pending before him from the decree or order of a Munsif. An application under sub-section (6) of section 195 of the Criminal Procedure Code, is, in our view, not an appeal within the meaning of sub-section (1) of section 22 of the Bengal Civil Courts Act, 1887. It has not been suggested to us in this case that any order has been made by the High Court under sub-section (4) of section 21 of the Bengal Civil Courts Act, 1887, so as to constitute the Subordinate Judge the appellate authority over the Munsif. Consequently, the order made by the Subordinate Judge was passed without jurisdiction. The Rule is therefore, made absolute and the order assailed is discharged. The District Judge will now take up the matter and deal with it as early as practicable.

Since this order was passed, we have found that the view taken by us is in harmony with that adopted by D. Chatterjee, and N. R. Chatterjea, JJ., in *Ram Charan Chanda Talukdar v. Taripulla* (1).

O. M.

*Rule absolute.*

(1) (1912) 1. L. R. 39 Calc. 774.



**CRIMINAL REVISION.**

*Before Mr. Justice Holmwood and Mr. Justice Imam.*

MANIRUDDIN SIRCAR

1912

v.

April 18.

ABDUL RAUF.\*

*Criminal Revision—Dismissal of complaint, reasons for—Criminal Procedure Code (Act V of 1898), s. 203—Grounds not taken in the first Court of Revision might be taken in the High Court—Government Circular, its effect—Statute law—Practice.*

Grounds, which were not urged in the first Court of Revision, might be taken in the High Court.

Under s. 203 of the Criminal Procedure Code (Act V of 1898) reason for dismissing the complaint must be recorded.

No circular of the Government can authorize Magistrates to infringe, or in any way alter, the statute law.

ON the 2nd of January 1912, one Maniruddin Sircar made a complaint before the Subdivisional Magistrate of Tangail against the Sub-Inspector in charge of Gopalpur and two policemen, charging them with having extorted Rs. 100 as bribe for withholding the search of his house. After examining the complainant, the Subdivisional Officer asked the second Magistrate to hold a local enquiry. Thereupon the second officer examined ten witnesses locally. These witnesses were cross-examined at length for the defence. On the 11th of January 1912 the second officer submitted his report recommending trial of the Sub-Inspector.

On receipt of the report submitted by the 2nd officer, the Subdivisional Officer called for some police

\* Criminal Revision, No. 357 of 1912, against the order of J. D. Cargill, Sessions Judge of Mymensingh, dated Feb. 29, 1912.

1912  
MANIRUDDIN  
SIRCAR  
"v."  
ABDUL  
RAUF.

papers and also some witnesses mentioned by the accused Sub-Inspector.

After examining the witnesses, the Subdivisional Officer, on the 7th of February 1912, dismissed the complaint under s. 203 of the Criminal Procedure Code, and directed the complainant to be prosecuted under s. 211 of the Indian Penal Code.

Against that order the complainant moved the District Judge, who, by his judgment dated the 29th of February 1912, declined to interfere in the matter. Against this order of the District Judge, the complainant moved the High Court and obtained the present Rule.

*Babu Narendra Kumar Bose*, for the petitioner.

HOLMWOOD AND IMAM JJ. This was a Rule calling upon the District Magistrate of Mymensingh to show cause why an order for further enquiry in this case should not be made, and why the order for prosecution under section 211 of the Indian Penal Code passed should not be set aside on detailed grounds which after considering the general allegations of the petitioner we ourselves formulated with some care. The learned Judge takes exception to the Rule on the ground that these reasons which, as we have said, we ourselves formulated with some care, are not grounds which were urged before him, and this is an infringement of the spirit of the High Court's order that in revision matters must first of all be urged before the first Court of revision. We do not think it is so. The matter was put before us by the learned vakil in precisely the same general way in which it was put before the learned Judge, the principal arguments being, *first*, that on the evidence further enquiry should be ordered, and, *secondly*, that even if such

further enquiry were not ordered, the evidence did not justify the proceeding under section 211. We found that there were rather more intricate and important points involved in this matter; and if the petitioner takes advantage of the superior intelligence and legal training of the learned vakils of this Court, we cannot see why he should be debarred from urging even new matter in moving this Court. It may very well be that the learned vakil in the mufassil neither knew nor appreciated the points which might be raised in a case of this kind.

Now coming to the merits of the matter, the learned Magistrate admits that he is out of Court, inasmuch as he did not record any reasons for dismissing the complaint. It is an imperative provision of the law which has been specially enacted in the latest amendment of that law in section 203, Criminal Procedure Code. The law says that in such cases he shall briefly record his reasons for dismissing the complaint. There can be no question of irregularity where the provisions of the statute are imperative and are directly disobeyed. We need not go into the other points, inasmuch as if the order of dismissal is without jurisdiction and altogether bad there must be a further enquiry, and there cannot be any proceeding under section 211 until such further enquiry has been made.

Having regard to the very unfortunate results of a certain Circular of the Government of Bengal, which is constantly being referred to before us, with regard to enquiries which ought to be made into the conduct of Police officers when they are charged with any offence, we wish to point out that no Circular of the Government can authorize Magistrates to infringe or in any way alter the statute law. We have no doubt that this Circular was never intended to

1912  
MANIRUDDIN  
SIRCAR  
v.  
ABDUL  
RAUF

1912

MANIRUDDIN  
SIRCAR  
v.  
ABDUL  
RAUF.

cause any modification in the procedure laid down by the Code of Criminal Procedure, nor does it appear to us to necessitate any alteration in the regular procedure of the Courts. The Government very properly have said that in their opinion, when a Police officer is charged with a serious offence, that that offence should be enquired into at once on the spot by a Magistrate of the first class. That does not mean that the Subdivisional Officer, if he has not got time to make the enquiry himself, can make use of the provisions of section 202, Criminal Procedure Code, and send it to a Subordinate Magistrate to hold a local investigation and examine both sides and then afterwards treat it as if the matter was still in his file. What the Circular means and what the proper procedure is, is that an experienced first class Magistrate should himself hold the enquiry, if possible, and if he is to depute it to another first class Magistrate, that first class Magistrate should from the first have seisin of the case, and should investigate the case in any way he thinks proper and should decide it finally. But the view, which some of the lower Courts have taken of the Circular, has resulted in their holding a vicarious trial by means of another Magistrate hearing both sides and then ordering prosecution for bringing a false case without having disposed of the original complaint. All sorts of irregularities and failures of justice have followed in consequence. We hope that after this expression of our opinion, the procedure adopted will in future be in conformity with law. In this case we think the best way to deal with it would be to summon the Sub-Inspector before the Magistrate having jurisdiction and call upon him to answer to those offences which the investigating Magistrate has found there is reason to believe he committed, so as to save all further necessity for

enquiries under section 202 or any other preliminary investigation.

The Rule is made absolute in these terms, and there will be further enquiry in the manner we have indicated.

S. K. B.

*Rule absolute.*

1912

MANIRUDDIN  
SIRCAR  
v.  
ABDUL  
RAUF.

## APPELLATE CIVIL.

*Before Justice Sir Cecil Brett and Mr. Justice N. R. Chatterjea.*

KUMED BEWA

v.

PRASANNA KUMAR ROY.\*

1912

May 6.

*Execution of decree—Notice of execution—Sale—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 22 and 90—Omission to serve notice, effect of—Whether subsequent sale void—Question relating to execution of decree—Second appeal.*

Omission to serve a notice under the provisions of O. XXI, r. 22 of the Civil Procedure Code is not by itself sufficient to render a sale, which has been subsequently held, void.

*Sahdeo Pandey v. Ghasiram Gyaawal* (1) not followed.

Though an application to set aside a sale on the ground that no notice had been served as required by O. XXI, r. 22 of the Civil Procedure Code is one which cannot be made under the provisions of O. XXI, r. 90 of the Code, but must be one made under the provisions of s. 47 of the Code, still in order to justify a Court in setting aside a sale on the ground of the omission to serve a notice under O. XXI, r. 22, it must be proved that the omission to serve such notice has resulted in substantial injury to the owner of the property sold.

*Lakshmi Charan Sen v. Sris Chandra Roy* (2) referred to.

\* Appeal from order, No. 223 of 1911, against the order of B. C. Mitter, District Judge of Murshidabad, dated Feb. 3, 1911, confirming the order of Gajanan Banerjee, 2nd Munsif of Jangipore, dated Sept. 26, 1910.

1912

KUMED  
BEWA  
v.PRASANNA  
KUMAR  
ROY.

A second appeal lies from an order passed on appeal on an application to set aside a sale on the ground, that no notice had been served as required by O. XXI, r. 22 of the Code.

SECOND appeal by the petitioners (representatives of the judgment-debtors), Kumed Bewa and others.

This appeal arose out of an application to set aside a sale held in execution of a rent decree. The petitioners, who were the representatives of the judgment-debtors, alleged, that no notice was served upon them under O. XXI, r. 22, that no sale proclamation was served and that no attachment was issued; and as such the sale was bad in law. The opposite party (the auction purchaser) denied the allegations made by the petitioners, and contended that omission to serve a notice under O. XXI, r. 22, was only an irregularity, and that the sale could not be set aside in the absence of proof of substantial injury caused to the judgment-debtor on account of such omission. The Court of first instance having held, that omission to serve a notice was only an irregularity, and that in as much as the petitioners did not suffer any substantial injury on account of such omission, refused to set aside the sale. On appeal, the learned District Judge affirmed the decision of the first Court.

Against this decision the petitioners appealed to the High Court.

*Babu Chandra Shekhar Banerjee* for *Babu Ram Chandra Majumdar* (with him *Babu Harish Chandra Roy*), for the respondent, took a preliminary objection that no second appeal lay. The application was under O. XXI, r. 90 of the new Code of Civil Procedure, and no second appeal lay against an order passed on appeal under this section.

*Babu Biraj Mohan Majumdar*, for the appellants. The application was one under s. 47 of the new Code

of Civil Procedure, and as such a second appeal lay. The sale was sought to be set aside on the ground that no notice under O. XXI, r. 22 was served, therefore the sale could not take place at all, and the question raised was one as to the execution of the decree. It was held in the case of *Ashton v. Madhabmani Dasi* (1) that omission to serve a notice was itself sufficient to set aside the sale. See also the case of *Sahdeo Pandey v. Ghasiram Gyawal* (2).

*Babu Chandra Sekhar Banerjee*. Omission to serve a notice was utmost an irregularity and the sale could only be set aside on showing that the petitioners suffered substantial injury on account of such omission: see *Lakshmi Charan Sen v. Sris Chandra Roy* (3). Upon the findings arrived at by the Courts below, the sale could not be set aside.

*Babu Biraj Mohan Majumdar*, in reply.

BRETT AND N. R. CHATTERJEA JJ. The only question raised in this appeal is whether the omission to serve a notice under the provisions of O. XXI, r. 22 of the new Code of Civil Procedure corresponding to section 248 of the old Code is by itself sufficient to render a sale, which has subsequently been held, void. In the present case, an application was made by the present appellants, to have a sale set aside on that ground and the Court of first instance treating the application as one under O. XXI, r. 90 of the new Code came to the conclusion that the judgment-debtors had failed to prove any irregularity which, by reason of the fact that it had caused substantial injury to them, would be a sufficient ground for setting aside the sale. On appeal before the District Judge, the main question which seems to have been contested was

1912  
KUMED  
BEWA  
v.  
PRASANNA  
KUMAR  
ROY.

(1) (1910) 14 C. W. N. 560 ;

11 C. L. J. 489.

(2) (1893) I. L. R. 21 Calc. 19, 23.

(3) (1910) 13 C. L. J. 162.

1912  
 KUMED  
 BEWA  
 v.  
 PRASANNA  
 KUMAR  
 ROY.

whether the application was preferred under O. XXI, r. 90, corresponding to section 311 of the old Code or under section 47 of the new Code corresponding with section 244 of the old Code. The learned Judge appears to have been of opinion that the application was one under r. 90 of O. XXI of the new Code, but at the same time he held that even if it could be regarded as an application under section 47, as the judgment-debtors had failed to prove any substantial loss resulting from any irregularity, the application to set aside the sale could not succeed. The judgment-debtors have appealed to this Court and a preliminary objection is taken to the competency of the appeal on the ground that, as the application was one under O. XXI, r. 90, no second appeal would lie. The learned pleader for the appellants has, however, contended that the application could not be one falling under O. XXI, r. 90, because the service of the notice under section 248 of the old Code was not a matter arising in the execution of the decree itself, and he has further contended that the omission to serve the notice under section 248 of the old Code is itself sufficient to render the sale void. He has referred us to the decision of this Court in the case of *Ashton v. Madhabmoni Dasi* (1). On the other hand the learned pleader for the respondent has relied on the decision of this Court in the case of *Lakshmi Charan Sen v. Sris Chandra Roy* (2). We have considered these two decisions carefully and, in our opinion, they do not support the view that the omission to serve the notice required by O. XXI, r. 22, is sufficient to render a subsequent sale void. In the case of *Ashton v. Madhabmoni Dasi* (1), on which the appellant's vakil relies, reference is made to the decision of the Privy Council in the case of

(1) (1910) 11 C. L. J. 489 ; 14 C. W. N. 560. (2) (1910) 13 C. L. J. 162.



*Malkarjun v. Narahari* (1). Their Lordships of the Privy Council, in dealing with the question whether a sale held without the issue of a notice under section 248 of the Code is a nullity, expressed the opinion that the omission would constitute a serious irregularity entitling the judgment-debtors to vacate the sale, but at the same time they laid down that, after the sale had become complete, the sale was a reality which could be defeasible only in the way provided by law, and they seemed to favour the opinion which was afterwards expressed by this Court in the case of *Lakshmi Charan Sen v. Sris Chandra Roy* (2), which is relied on by the learned pleader for the respondents, that though an application to set aside a sale on the ground that no notice had been served as required by O. XXI, r. 22, is one which cannot be made under the provisions of O. XXI, r. 90 of the new Code corresponding with section 311 of the old Code, but must be one made under the provisions of section 47 of the new Code corresponding with section 244 of the old Code still, in order to justify a Court in setting aside a sale on the ground of the omission to serve a notice under O. XXI, r. 22, it must be proved that the omission to serve such notice has resulted in substantial injury to the owner of the property sold. The learned pleader for the appellants has also referred to the case of *Sahdeo Pandey v. Ghasiram Gyawal* (3) to support the contention that the omission to serve the notice renders the sale void. We are not, however, prepared to follow the decision in that case, and consider that we are bound by the decision of the Privy Council which has been followed in the two cases which have been already mentioned and which are reported in 11 and 13 C. L. J. In the

1912

KUMED  
BEWA

v.

PRASANNA  
KUMAR  
ROY.

(1) (1900) I. L. R. 25 Bom. 337 ; (2) (1910) 13 C. L. J. 162.

L. R. 27 I. A. 216.

(3) (1893) I. L. R. 21 Calc. 19.

1912  
 KUMED  
 BEWA  
 v.  
 PRASANNA  
 KUMAR  
 ROY.

present case both the lower Courts have found that the judgment-debtors failed to prove that they have suffered any substantial loss by the sale, and, in these circumstances, we consider that both the lower Courts were justified in the conclusion at which they arrived that the sale could not be set aside.

The result, therefore, is that the appeal is dismissed with costs.

S. C. G.

*Appeal dismissed.*

### APPELLATE CIVIL.

*Before Justice Sir Cecil Brett and Mr. Justice N. R. Chatterjee.*

1912  
 May. 8.

GOUR CHANDRA DAS

v.

SARAT SUNDARI DASSI.\*

*Letters of administration—Revocation—Probate and Administration Act (V of 1881), s. 50, Expl.(4)—“Just cause”—“Useless or inoperative,” meaning of—Disagreement between administrators, whether a just cause for annulling letters of administration.*

A mere disagreement between administrators is not a “just cause” for annulling the letters of administration under s. 50, expl.(4) of the Probate and Administration Act.

The words “becomes useless and inoperative” in s. 50, expl. (4) of the Probate and Administration Act, imply the discovery of something which if known at the date of the grant would have been a ground for refusing it; e.g., the discovery of a later will or codicil, or subsequent discovery that the will was forged, or that the alleged testator is still living.

*Bal Gangadhar Tilak v. Sakwarbai* (1) and *Annoda Prosad Chatterjee v. Kalikrishna Chatterjee* (2) followed.

APPEAL by the petitioner, Gour Chandra Das.

\*Appeal from original Decree, No. 545 of 1909, against the decree of W. S. Coutts, District Judge of Dacca, dated Sept. 18, 1909.

(1) (1902) I. L. R. 26 Bom. 792.

(2) (1896) I. L. R. 24 Calc. 95.

One Chaitan Krishna Poddar died leaving behind him a widow, his brother's son's wife, Sreemati Sarat Sundari, and an adopted son of the latter named Gour Chandra Dass. He left a will, dated the 21st Jaista, 1283 B.S. (19th June 1876). On the death of the widow of Chaitan Krishna Poddar, who took out letters of administration under the will, Sreemati Sarat Sundari Dassi obtained letters of administration. There being some difference of opinion between Sarat Sundari Dassi and her adopted son, the present petitioner, a compromise was arrived at, and joint administration was granted to both on the 31st of August, 1903. The petitioner then made an application on the 26th of May, 1909, in the Court of the District Judge of Dacca, in which he charged the adoptive mother with taking several *hatchittas* in her name only at the time when she was the sole administratrix; and he prayed that his name should be added in those *hatchittas*. He, further, made a complaint against Sarat Sundari Dassi that she had not paid the allowance due to him regularly, and that she had not paid the municipal taxes for his house which she was bound to pay. On the 16th of July, 1909, Sarat Sundari Dassi put in a petition stating, *inter alia*, that if there had been a failure to pay the allowance and the municipal taxes, it was due to the action taken by the petitioner and his father-in-law. On the 17th of September, 1909, a fresh application was put in by Gour Chandra Dass asking that Sarat Sundari should be removed from the administration, and the grant of letters of administration should be revoked.

The learned District Judge rejected the application holding that there was absolutely no ground for revoking the letters of administration as prayed for.

Against that decision the petitioner preferred this appeal to the High Court.

1912  
 GOUR  
 CHANDRA  
 DAS  
 v.  
 SARAT  
 SUNDARI  
 DASSI.

1912  
 KUMED  
 BEWA  
 v.  
 PRASANNA  
 KUMAR  
 ROY.

present case both the lower Courts have found that the judgment-debtors failed to prove that they have suffered any substantial loss by the sale, and, in these circumstances, we consider that both the lower Courts were justified in the conclusion at which they arrived that the sale could not be set aside.

The result, therefore, is that the appeal is dismissed with costs.

S. C. G.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Justice Sir Cecil Brett and Mr. Justice N. R. Chatterjee.*

1912  
 May. 8.

GOUR CHANDRA DAS

v.

SARAT SUNDARI DASSI.\*

*Letters of administration—Revocation—Probate and Administration Act (V of 1881), s. 50, Expl. (4)—“Just cause”—“Useless or inoperative,” meaning of—Disagreement between administrators, whether a just cause for annulling letters of administration.*

A mere disagreement between administrators is not a “just cause” for annulling the letters of administration under s. 50, expl.(4) of the Probate and Administration Act.

The words “becomes useless and inoperative” in s. 50, expl. (4) of the Probate and Administration Act, imply the discovery of something which if known at the date of the grant would have been a ground for refusing it; e.g., the discovery of a later will or codicil, or subsequent discovery that the will was forged, or that the alleged testator is still living.

*Bal Gangadhar Tilak v. Sakwarbai* (1) and *Annoda Prosad Chatterjee v. Kalikrishna Chatterjee* (2) followed.

APPEAL by the petitioner, Gour Chandra Das.

\*Appeal from original Decree, No. 545 of 1909, against the decree of W. S. Coutts, District Judge of Dacca, dated Sept. 18, 1909.

(1) (1902) I. L. R. 26 Bom. 792. (2) (1896) I. L. R. 24 Calc. 95.

One Chaitan Krishna Poddar died leaving behind him a widow, his brother's son's wife, Sreemati Sarat Sundari, and an adopted son of the latter named Gour Chandra Dass. He left a will, dated the 21st Jaista, 1283 B.S. (19th June 1876). On the death of the widow of Chaitan Krishna Poddar, who took out letters of administration under the will, Sreemati Sarat Sundari Dassi obtained letters of administration. There being some difference of opinion between Sarat Sundari Dassi and her adopted son, the present petitioner, a compromise was arrived at, and joint administration was granted to both on the 31st of August, 1903. The petitioner then made an application on the 26th of May, 1909, in the Court of the District Judge of Dacca, in which he charged the adoptive mother with taking several *hatchittas* in her name only at the time when she was the sole administratrix; and he prayed that his name should be added in those *hatchittas*. He, further, made a complaint against Sarat Sundari Dassi that she had not paid the allowance due to him regularly, and that she had not paid the municipal taxes for his house which she was bound to pay. On the 16th of July, 1909, Sarat Sundari Dassi put in a petition stating, *inter alia*, that if there had been a failure to pay the allowance and the municipal taxes, it was due to the action taken by the petitioner and his father-in-law. On the 17th of September, 1909, a fresh application was put in by Gour Chandra Dass asking that Sarat Sundari should be removed from the administration, and the grant of letters of administration should be revoked.

The learned District Judge rejected the application holding that there was absolutely no ground for revoking the letters of administration as prayed for.

Against that decision the petitioner preferred this appeal to the High Court.

1912  
 GOUR  
 CHANDRA  
 DAS  
 v.  
 SARAT  
 SUNDARI  
 DASSI.

1912  
 GOUR  
 CHANDRA  
 DAS  
 v.  
 SARAT  
 SUNDARI  
 DASSI.

*Babu Kritanta Kumar Bose (Dr. Sarat Chandra Basak with him)*, for the appellant. Question is, when two persons have got joint administration and they do not agree, whether one of them can apply for annulling the letters of administration under section 50 of the Probate and Administration Act, I submit that is a "just cause" within the meaning of section 50, expl. (4) of the Act. On account of the disagreement, the grant has become useless and inoperative.

*Babu Harish Chandra Roy*, for the respondents. Disagreement between the administrators is not a "just cause" within the meaning of section 50 of the Act. It has been held in the case of *Annoda Prosad Chatterjee v. Kali Krishna Chatterjee* (1), that mismanagement is not a "just cause."

[CHATTERJEE J. referred to *Bal Gangadhar Tilak v. Sakwarbai* (2).]

*Babu Kritanta Kumar Bose*, in reply, referred to Illustration (h) of section 50 of the Act.

BRETT AND N. R. CHATTERJEE JJ. This is an appeal against an order passed by the District Judge of Dacca on the 18th September 1909 refusing an application made by the present appellant for the removal of Sarat Sundari Dassi from the administration of the estate of Chaitan Krishna Poddar. It appears that the appellant and Sarat Sundari Dassi are related to each other as adopted son and adoptive mother, and that letters of administration to the estate of Chaitan Krishna Poddar were granted to them after the death of the widow of Chaitan Krishna, in whose favour as the first beneficiary under the will letters of administration had previously been granted. There was some difference of opinion between the parties at first, and, on the 31st August 1903, a compromise was arrived at

(1) (1896) I. L. R. 24 Calc. 95.

(2) (1902) I. L. R. 26 Bom. 792.

and joint administration was granted to both. On the 26th May 1909, the petitioner made an application to the Court which contained several allegations against Sarat Sundari Dassi. Amongst them one was that she had taken *hatchittas* from various debtors to the estate during the time when she was the sole administratrix, and that those *hatchittas* had been taken in her name only. It was asked that the name of the present appellant as joint administrator should be added in those *hatchittas*. The learned Judge took action on that complaint with the result that the addition asked for was made in most of the *hatchittas*; but, in the order recorded on the 3rd September 1909, it was stated that, in certain *hatchittas*, the addition prayed for had not been made, and, therefore, they would remain in Court in the record until the change could be made. There was also in the same petition a complaint against Sarat Sundari Dassi that she had not paid the allowance due to the appellant regularly and that she had not paid the municipal tax for his house which she was bound to pay. Sarat Sundari put in, on the 16th July 1909, a petition in which with reference to these later complaints she made certain statements and alleged that, if there had been any failure on her part to pay the allowance as it fell due and the municipal tax, it was not the result of any fault on her part, but was owing to the action taken on the part of the appellant and his father-in-law. That matter does not appear to have been dealt with in the proceedings before the Judge on that application; but, on the 17th September 1909, a fresh application was put in by the present appellant asking that Sarat Sundari should be removed from the administration and that the grant of letters of administration to her should be revoked. It is not quite clear whether the learned Judge in passing the order, which

1912

GOUR  
CHANDRA  
DAS  
v.  
SARAT  
SUNDARI  
DASSI.

1912  
GOUR  
CHANDRA  
DAS  
v.  
SARAT  
SUNDARI  
DASSI.

he did, dismissing that application, did so in view of the action which had been previously taken on the previous application, but the question which we have to consider in this case is whether we should interfere with the order passed by the District Judge on the ground that that order was not in accordance with law or not justified by the circumstances of the case. The learned pleader who appears in support of the appeal admits that the application was made under the provisions of section 50 of the Probate and Administration Act, and he contends that "the cause" for which it was asked that the grant of letters should be revoked or annulled in respect of Sarat Sundari was "a just cause" within the meaning of that section. He refers to the 4th Explanation attached to that section, and argues that, in this case, the grant has become useless and inoperative through "circumstances." On being pressed to explain what the circumstances are, the learned pleader is unable to advance any other circumstance than the one that the lady and her adopted son have quarrelled, and he says that in consequence of this quarrel it has become impossible to carry on the administration. It has also been suggested, but not very strongly pressed before us, that the allegations that she had not administered the estate properly would be a sufficient ground for annulling the grant of letters of administration. In our opinion, the grounds which have been advanced in support of the contention that the decision of the learned Judge should be set aside on the ground that he was not right in holding that just cause for annulling the letters of administration had not been made out cannot be sustained. It has been held by this Court in the case of *Annada Prosad Chatterji v. Kali Krishna Chatterji* (1), that a mal-administration is



not, under section 50, Expl. (4) of the Probate and Administration Act, a just cause for revoking the probate. It has also been held by the Bombay High Court in the case of *Bal Gangadhar Tilak v. Sakwarbai* (1), that the words "become useless and inoperative" in section 50, clause (4) of the Probate Act imply the discovery of something which, if known at the date of the grant, would have been a ground for refusing it, *e.g.*, the discovery of a later will or codicil or the subsequent discovery that the will was forged or that the alleged testator was still living. We see no reason to differ from the view which has been taken by the learned Judges in these two cases, and, following that view, we are of opinion that the only ground which has really been pressed in support of this appeal, namely, that the grant has become useless and inoperative because of the disagreement between the administrators, is not a just cause for annulling the letters. In these circumstances, we are of opinion that we cannot interfere with the decision of the lower Court and that the appeal must be dismissed with costs. At the same time, we desire to say that, if the appellant considers that he has any sufficient ground for pressing the complaints which were made in his application of the 26th May 1909 supposing that those complaints have not up to date received the consideration of the District Judge, it will certainly be open to him to apply to the lower Court, in order that an inquiry may be made into the substance of the complaints, and such action taken as to that Court may seem fit.

1912  
— —  
GOUR  
CHANDRA  
DAS  
v.  
SARAT  
SUNDARI  
DASSI.

S. C. G.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Justice Sir Cecil Brett and Mr. Justice Sharfuddin.*

1912

May 17.

PANCHURAM TEKADAR

*v.*

KINOO HALDAR.\*

*Mesne profits—Jurisdiction—Suit for recovery of possession with mesne profits—Mesne profits assessed in the execution proceedings—Amount assessed more than the pecuniary jurisdiction of the Court.*

A suit for recovery of possession of certain lands with mesne profits from the date of dispossession up to the date of restoration of possession was brought in the Munsiff's court. It was decreed together with the mesne profits claimed, and the Court directed that the amount of mesne profits would be determined in the execution proceedings. The decree having been affirmed on appeal, the decree-holder applied to the executing Court for ascertainment of mesne profits. The total amount of mesne profits ascertained by the Munsiff was Rs. 1,630-8 including interest. On an objection taken by the judgment-debtor that the executing Court being a Munsif, was not entitled to award mesne profits of a higher amount than Rs. 1,000 :

*Held*, that the executing Court had jurisdiction to award the mesne profits ascertained in the present case.

*Rameswar Mahton v. Dilu Mahton* (1) followed in principle.

*Bhupendra Kumar Chakrabarti v. Purna Chandra Bose* (2) distinguished.

SECOND APPEAL by the judgment-debtor, Panchuram Tekadar.

This appeal arose out of an application for ascertainment of mesne profits in the execution proceedings. It appeared that one Kinoo Haldar brought a suit for recovery of possession of certain

\* Appeal from order, No. 186 of 1911, against the order of Ashutosh Sarkar, Subordinate Judge of Khulna, dated Jan. 6, 1911, confirming the order of Akhoy Kumar Bose, Munsif of Khulna, dated Dec. 2, 1909.

(1) (1894) I. L. R. 21 Cal. 550. (2) (1910) 13 C. L. J. 132

lands with mesne profits from the date of dispossession up to the date of delivery of possession in the court of the Munsif at Khulna on the 6th of March, 1907. The plaintiff alleged that he had been dispossessed on the 23rd of Chait, 1311 B. S., and mesne profits were claimed for the years 1312 to 1315 B. S. The learned Munsif decreed the plaintiff's suit together with mesne profits claimed, and he directed that the amount of mesne profits would be determined in the execution proceedings. This order having been affirmed on appeal, the decree-holder applied to the executing Court (Munsif's Court) for ascertainment of mesne profits decreed. The Court held that the decree-holder was entitled to recover mesne profits for 1312, 1313 and 1314, but was not entitled to any mesne profits for 1315; and the total amount of mesne profits so ascertained was Rs. 1,630-8 inclusive of interest. The judgment-debtor objected that the executing Court had no jurisdiction to allow mesne profits higher than its pecuniary jurisdiction, *i.e.*, Rs. 1,000. This objection being overruled, an appeal was preferred by the judgment-debtor to the Subordinate Judge, who affirmed the decision of the first Court. The judgment-debtor thereupon preferred an appeal to the High Court.

*Babu Sarat Chandra Ghose*, for the appellant, contended that the Munsif had no jurisdiction to award mesne profits higher than one thousand rupees, which is the pecuniary jurisdiction of the Court: *Bhupendra Kumar Chakrabarti v. Purna Chandra Bose* (1).

*Babu Jadu Nath Kanjilal*, for the respondent. The case cited by the other side is distinguishable. In that case the value of the claim for mesne profits

1912  
PANCHURAM  
TEKADAR  
v.  
KINOO  
HALDAR.

1912  
 PANCHURAM  
 TEKADAR  
 F.  
 KINOO  
 HALDAR.

was much above Rs. 5,000, and this sum not only exceeded the pecuniary jurisdiction of the executing Court, but, if allowed, a difficulty would have arisen as to the *forum* of the appeal. There could be no appeal from the decision of the Munsif direct to the High Court. In the present case no such difficulty arises. The case of *Rameswar Mahton v. Dilu Mahton* (1) supports my contention.

*Babu Sarat Chandra Ghose*, in reply.

BRETT AND SHARFUDDIN JJ. This is an appeal against an order passed by the lower Appellate Court confirming an order made by the Court of first instance in certain execution proceedings relating to mesne profits. It appears that the respondent in the present appeal obtained a decree against the present appellant for recovery of possession of a certain piece of land with mesne profits. It is alleged that the plaintiff respondent had been dispossessed on the 23rd Chait 1311, and mesne profits were claimed for the years 1312 to 1315. The suit was instituted on the 6th March 1907 in the Munsif's Court, and a decree was obtained by the plaintiff for recovery of possession of the land in suit, together with mesne profits, from the date of dispossession up to the date of the restoration of possession, and it was directed that the amount of mesne profits would be determined in the execution proceedings. The decree was appealed against, but it was confirmed. The execution proceedings for the purpose of determining the amount of mesne profits then commenced, and as a result it was determined that the plaintiff was entitled to recover mesne profits for 1312, 1313 and 1314, but was not entitled to any mesne profits for

1315, because during that year he had himself taken away the crops on the land. The total amount of mesne profits so ascertained was Rs. 1,630-8 which sum<sup>a</sup> included interest amounting to Rs. 294.

An appeal was preferred against the decision of the executing Court allowing mesne profits to the plaintiff to the extent of that sum, and in support of it various points were taken which also had been argued before the court of first instance. For the purposes of this appeal, the only point which it is necessary for us to consider is that urged on behalf of the judgment-debtor, the present appellant, namely, that the executing court being a Munsif's Court was not entitled to award mesne profits of a higher amount than Rs. 1,000, that being the ordinary pecuniary jurisdiction of such Court. In support of that contention, reliance was placed on the case of *Golap Singh v. Indra Coomar Hazra* (1). Both the Courts of first instance and the lower Appellate Court held that that case had no application whatever to the facts of the present case, that being a suit brought for accounts, and this High Court having held in that case that it was the duty of the plaintiff to ascertain approximately before instituting the suit the amount which he claimed to be due on taking accounts so as to determine the court in which the plaint should be filed. In that case the sum which was found to be due by the Court exceeded Rs. 8,000. In the present case, both the lower Courts relying on the decision of this Court in the case of *Rameswar Mahton v. Dihu Mahton* (2) were of opinion that, under the provisions of section 211 of the old Code of Civil Procedure, which corresponds with Order XX, rule 12 of the new Code, the Munsif's Court had jurisdiction in execution of the decree to award as mesne profits the sum allowed.

1912  
PANCHURAM  
TEKADAR  
v.  
KINOO  
HALDAR.

(1) (1909) 13. C. W. N. 493.

(2) (1894) I. L. R. 21 Calc. 550.

1912  
PANCHURAM  
TEKADAR  
v.  
KINOO  
HALDAR.

The judgment-debtor has appealed to this Court, and in support of the appeal the main contention which has been advanced is that the lower Courts erred in holding that the Munsif's Court as a Court of execution had power to award to the plaintiff a decree for mesne profits in excess of Rs. 1,000. In support of this contention reliance is placed on the decision of this court in the case of *Bhupendra Kumar Chakrabarti v. Purna Chandra Bose* (1). We have read through the judgment of this Court delivered in that case, and in our opinion the facts of that case and the grounds which influenced the decision of the learned Judges in that case are very distinct from the facts of the present case. There the suit was to recover possession of land valued at Rs. 686-8 and mesne profits valued at Rs. 200 up to the date of the institution of the suit, and mesne profits from the date of the institution of the suit up to the date of the recovery of possession, to be ascertained in execution. The suit was decreed in favour of the plaintiff for recovery of possession of the land claimed, and also for mesne profits claimed, the amount to be determined in execution proceedings. When execution proceedings were taken, the claim for mesne profits *pendente lite* was laid at over Rs. 60,000. It does not appear in that case that any mesne profits were, in fact, ascertained, but on appeal to this Court, it was held that the Munsif had not jurisdiction to entertain the claim for mesne profits *pendente lite* for such a large amount. The learned Judges in that case pointed out that there were two weighty and obvious reasons why the Munsif should not be allowed to exercise jurisdiction, and why the rule laid down in the case of *Rameswar Mahton v. Dilu Mahton* (2) could not possibly be extended to that case. The two reasons were, *first*, that the value

(1) (1910) 13 C. L. J. 132.

(2) (1894) I. L. R. 21 Cal. 550.

of the claim for mesne profits *pendente lite* which the decree-holder invited the Court to investigate was much in excess of the value of a suit which the Munsif was generally competent and specially authorised to try, and, *secondly*, that if the Munsif investigated the claim, there would be insuperable difficulty as to the *forum* of the appeal, which could not be either the Court of the District Judge who could hear appeals only in suits of which the value did not exceed Rs. 5,000 or this Court, and because the Legislature never contemplated an appeal direct from the decision of the Munsif to the High Court. For these reasons, the learned Judge held that the Munsif could not entertain the application for investigation of mesne profits *pendente lite*, as the claim was laid at over Rs. 60,000. In the present case the claim was not laid at anything like that sum, and, in fact, the amount was only ascertained in the course of the execution proceedings by a Commissioner specially appointed for that purpose. In the present case the amount of mesne profits ascertained does not exceed Rs. 5,000 or, in fact, approach near that amount, and no question as to the *forum* of appeal arises. Furthermore this is not an appeal, as the case of *Bhupendra Kumar Chakrabarti v. Purna Chandra Bose* (1) was, against an application to the Munsif to investigate the mesne profits, but is an appeal against an award of mesne profits made by the Munsif in execution of a decree which has become final, and which investigation appears to have been conducted without any objection raised on behalf of the appellant. It was only after the amount of the mesne profits had been ascertained that the objection was taken that the Munsif had no jurisdiction to award mesne profits in excess of Rs. 1,000. In our opinion, therefore, the

1912  
PANCHURAM  
TEKADAR  
v.  
KINOO  
HALDAR

1912  
 PANCHURAM  
 TEKADAR  
 c.  
 KINOO  
 HALDAR.

ruling, on which the learned pleader for the appellant relies, has no application whatever to the facts of the present case. The principles laid down by this Court in the case of *Rameswar Mahton v. Dilu Mahton* (1) which have been followed by the lower Courts appear to us, on the other hand, to be fully applicable. In that case the learned Judge pointed out that the amount of mesne profits to be awarded up to the date of the delivery of possession, which the decree-holder would be entitled to recover, would be dependent not on his action, but on the opposition which the judgment-debtor might be able to offer to the delivery of possession to him, and it was considered that it was neither the intention of the law, nor would it be right, that the decree-holder should be deprived of his rightful profits or driven to a subsequent suit to recover the amount simply in consequence of opposition of the judgment-debtor. The learned Judge also pointed out that in most cases, where a suit is brought for recovery of possession and mesne profits, the Court would not be in a position at the time of the institution of the suit to say whether it had or had not jurisdiction until the enquiry as to the amount of the mesne profits had been completed. No doubt there is in this case an opinion expressed that where mesne profits are claimed prior to the institution of the suit, such profits and the value of the property in suit should not exceed the pecuniary jurisdiction of the Court trying the suit, but in the present case this question does not appear to have been raised in any of the lower Courts, nor in fact was it raised at first when the appeal was argued, and it was only as an after-thought that the learned pleader for the appellant suggested that the mesne profits for 1312 and 1313, together with the value of the property

(1) (1894) I. L. R. 21 Calc. 550.



in suit, would exceed Rs. 1,000. We have not the materials before us in this appeal to enter into that question and decide it, even if we were prepared to do so. Certainly, if that question had been raised in any of the lower Courts, it would have been open to the decree holder to determine whether or not he would relinquish any part of his claim for mesne profits prior to the institution of the suit, so as to bring the claim for mesne profits and recovery of possession within the pecuniary jurisdiction of the Munsif. As the facts at present stand before us, it is not possible for us to say that the contention is correct that the mesne profits claimed prior to the institution of the suit with the value of the property exceed Rs. 1,000. If the judgment-debtor relied on the contention now advanced before us, it was his duty to have taken the objection in the Munsif's Court or in the Court of first appeal, and not to advance it as a sort of last argument in this Court in second appeal. In our opinion, the reasons given by the learned Judges in the case of *Rameswar Mahton v. Dihu Mahton* (1) apply fully to the facts of the present case, and we are of opinion that it was with the object of allowing a plaintiff to recover the mesne profits claimed in a suit for recovery of possession of land after the institution of the suit, without being driven to a subsequent suit, that the provisions of section 211 of the old Code, which are now reproduced in rule 12 of Order XX of the new Code, were enacted. In our opinion, the view taken by the lower Courts is correct. The judgment and decree of the lower appellate Court are, therefore, confirmed, and the appeal is dismissed with costs.

1912  
PANCHURAM  
TEKADAR  
v.  
KINOO  
HALDAR.

S. C. G.

*Appeal dismissed.*

(1) (1894) I. L. R. 21 Calc. 550.

## APPELLATE CIVIL.

*Before Mr. Justice Stephen and Mr. Justice Richardson.*

1912

May 21.

MANMOHAN DUTT

*v.*

COLLECTOR OF CHITTAGONG.\*

*Land Acquisition—Compensation—Apportionment of Compensation-money—  
Method of Assessment—Government as landlord, share of.*

In assessing the amount of compensation due to the landlord, regard must be had to the question of how much the landlord is actually realising from the land.

The Government, in its capacity as landlord, is entitled as usual to a capitalisation of as much rent as may be found to be payable in respect of the proportion of the holding that is taken, together with 15 per cent. for compulsory acquisition, and something more in respect of the possibility of the enhancement of the value of the land thereafter.

The Government is not entitled in law to a higher proportion on the ground that in similar cases it has frequently received a higher proportion either by consent of the parties or otherwise.

APPEAL by Manmohan Dutt and others, the heirs and legal representatives of the claimant Jagat Chandra Dutt.

This appeal arose out of land acquisition proceedings in the district of Chittagong. The land was *noabad*, and the parties to the proceeding were the Government as landlord, Jagat Chandra Dutt and others as *jotedars*, and Shariatullah as *dar-jotedar*. The total amount awarded was Rs. 1,251-10-4, of which  $\frac{6}{18}$ th portion was apportioned to the Government as proprietor,  $\frac{3}{16}$  to the *jotedars* and  $\frac{7}{16}$  to the *dar-jotedars*. A reference was made to the Civil Court under section

\* Appeal from Original Decree, No. 285 of 1909, against the decree of F. J. Jeffries, District Judge of Chittagong, dated March 22, 1909.

18 of the Land Acquisition Act at the instance of one of the under-tenants. It was contended, *inter alia*, by the claimants that the share awarded to Government was too high and that Government was entitled only to the capitalised value of the rent payable, that the compensation money should be calculated upon the annual value after deduction of the Government revenue and that Government was not entitled to have 6 annas of the profits in addition to its rent. On behalf of Government it was urged that the share taken by Government was warranted by the usage which had sprung up in the district where extensive land acquisition proceedings had been taken for the Assam-Bengal Railway, that the usage had hitherto been acquiesced in by everyone concerned and that as landlord of a temporarily-settled estate, the rent of which is indefinitely liable to enhancement, Government was fairly entitled to the proportion awarded. The Judge upheld the Collector's apportionment.

The other points raised in the case were as regards the relationship between Jagat Chandra and others and Shariatulla, and the share of the compensation money to which each of the above sets were entitled.

*Babu Tarakishore Chaudhuri* (with him *Babu Dheerendralal Kashtgir* and *Babu Sateendranath Mukherjee*), for the appellants. There is no custom or usage to the effect that Government is entitled to a 6-annas share. The practice relied upon by the Government has not acquired the force of usage or custom. The Government in its State capacity is not entitled to any share, because the proportionate revenue has been deducted in calculating net profit of the land for which compensation has been assessed. The Government, in the other capacity, is in the position of a private *zemindar* in respect of *noabad*

1912  
 MANMOHAN  
 DUTT  
 v.  
 COLLECTOR  
 OF CHITTA-  
 GONG.

1912  
 ———  
 MANMOHAN  
 DUTT  
 v.  
 COLLECTOR  
 OF CHITTA-  
 GONG.

lands in Chittagong, and is not entitled to anything more than the capitalized value of the proportionate revenue payable for the land. The lower Court has erred in holding that with reference to the compensation money, the Government has a double interest as the State and as landlord. The chance of enhancement is not indefinitely large. The usual rate of 2 annas in the rupee after 15 years stands good here as in other cases. My occupancy right has been recognized by the Government in the *patta* granted to me, and it has no power to dispossess me.

The under-raiyat is not entitled to any share. A lease for more than 9 years is illegal. Shariatulla has not been able to prove that he spent any money on the land. He cannot claim permanent interest.

*The Senior Government Pleader (Babu Ram Charan Mitra)*, for the Secretary of State. The usage has been clearly established. There should be some provision for loss of revenue and chance of enhancement. The Government has here a double capacity and loses doubly.

*Babu Kshiteesh Chandra Sen*, for Shariatulla (respondent). The *patta* creates permanent right and Shariatullah acquired right of occupancy.

*Babu Tarakishore Chaudhuri*, in reply. As there is a conflict of decisions on the point whether such a lease is invalid or not, the matter should be referred to a Full Bench.

*Cur. adv. vult.*

STEPHEN AND RICHARDSON JJ. This is an appeal from a decision of the District Judge of Chittagong on a reference under section 18 of the Land Acquisition Act of 1894. The decision under appeal was arrived at on a remand from this Court which prescribed the way in which the lower Court has in fact

dealt with the case. The question that the Court had to try under these circumstances was how a sum of Rs. 1,251-10-4 awarded as compensation for land acquired under the Act should be apportioned. The three parties interested are the Government who are the *zemindar*, Jagat Chandra Dutt and others described by this Court as *jotedars* and Shariatullah and another similarly described as under-raiyats, and the lower Court has apportioned the compensation money to these three parties, respectively, in the proportions of six, three and seven annas.

The first question that we have to decide is whether the apportionment of a 6-anna share to the Government in their capacity as *zemindar* is correct. The land acquired, namely 4.56 kanis, is part of an area of 1 drone 4 kanis odd of land which was settled with Jagat Chandra in 1898 for fifteen years at a rent of Rs. 20. Were Jagat Chandra's rent fixed in perpetuity, it would be enough to capitalize this rent according to the rule laid down in *Dinendra Narain Roy v. Tituram Mukerjee* (1) in order to arrive at the share due to Government. As this is not the case, this alone will not be sufficient and some other means of calculation must be adopted. The lower Court has seen fit to allow the *zemindar* six annas of the whole compensation, chiefly on the ground that this has frequently been done, whether by the consent of the parties or not, in other similar cases. We cannot regard this method of assessment as satisfactory, as it leaves out of sight the question of how much the landlord is actually realising from the land, a fact which must have some bearing on the question of the amount of compensation, due to him. We cannot therefore uphold the decision of the lower Court in awarding Government a 6-anna share. But they are no

1912  
MANMOHAN  
DUTT  
v.  
COLLECTOR  
OF CHITTA-  
GONG.

(1) (1903) I. L. R. 30 Calc. 801.

1912

MANMOHAN  
DUTT  
v.  
COLLECTOR  
OF CHITTA-  
GONG.

doubt entitled to a capitalisation of as much rent as may be found to be payable in respect of the proportion of the holding that is taken together with 15 per cent. for compulsory acquisition, and something more in respect of the possibility of the enhancement of the value of the land hereafter. How this is to be assessed, we will consider later.

The next point dealt with by the lower Court is Jagat Chandra's position. We agree with him that he must be taken to be holding now as a raiyat. The chief ground on which the Judge relies for this finding is that when the land was settled in 1898, Jagat was described as a settled raiyat and Shariatulla as an under-raiyat. It is argued that when Jagat took possession of the land of which the acquired land is a part, and which he treated as an accretion to his jote, he at once made it over to Shariatulla on a permanent lease, and since then it has been cultivated by Shariatulla, who also conducted litigation respecting it. This looks as if Jagat treated it as a tenure-holder; but the action of the Government in settling it as they did was acquiesced in by both parties, and the question whether Jagat is now a tenure-holder is raised in this case for the first time. The conclusion to be drawn from the action of the Government is therefore not rebutted, and we hold that Jagat is now a raiyat and Shariatulla an under-raiyat. Taking Jagat Chandra to be a raiyat, we have to consider the relation in which he stands to Shariatulla. In the Court below the latter set up a claim to a permanent *dar-raiyati* right by custom. This failed and has not been pressed before us.

Jagat, however, has again raised a contention that he failed to substantiate in the lower Court to the effect that the permanent lease he granted to Shariatulla is void by force of section 85 (2) of the Bengal

Tenancy Act as being a sub-lease by a raiyat for a term exceeding nine years.

That, however, is not a complete statement of the question between Jagat and Shariatulla, because it appears that on the one hand when the lease was granted in the year 1894, the condition of things was such that there would seem to have been then no bar to the registration of the lease, and on the other hand rent is now being paid not under the lease but under the settlement of the year 1898. In the peculiar circumstances of the case and for the particular purpose in view, it is in our opinion unnecessary to base our decision of the question before us on an inquiry into the question to what extent (if any) the relationship between Jagat Chandra and Shariatulla is governed by the lease, or to consider the effect of the various cases which were cited at the Bar in connection with the provisions of section 85 of the Bengal Tenancy Act. It is sufficient to say that regard being had to the history of the land and of Shariatulla's connection therewith, to the *status quo* when the proceedings under the Land Acquisition Act were commenced, and to the probability that the state of things which then existed would have continued at any rate till the expiry of the term of the present settlement, we see no reason to differ from the learned District Judge as to the proportion in which the balance of the compensation available after deducting the amount payable to Government should be divided between them. Such a division will in our opinion meet the justice of the case.

In the result, therefore, we hold that the compensation should be apportioned among the three parties concerned as follows: Government receives a revenue or rent of Rs. 20 from the property, and it loses a chance of enhancing the rent of the land

1912

MANMOHAN  
DUTT  
F.  
COLLECTOR  
OF CHITTA-  
GONG.

1912

MANMOHAN  
DUTT  
P.  
COLLECTOR  
OF CHITTA-  
GONG.

after the determination of the 15 years. This will amount to something, though as we may suppose that the land is best used as a brickfield, it will not amount to much. We therefore award to Government so much of the compensation as will correspond to thirty years' purchase of the rent that accrues due in respect of the land taken which in this case is to be taken to include the statutory 15 per cent. As to the relative interests of Jagat and Shariatulla, though the figures in the case may give us some indication of how to assess them, we prefer to follow the plan adopted by the lower Court, and direct that after Government claims have been settled, the balance of the compensation money shall be awarded to Jagat and Shariatulla in the proportions of three to the former and seven to the latter.

The appeal is allowed accordingly, and the case is remitted to the lower Court that the compensation may be awarded on the lines we have indicated. Jagat is entitled to his costs against the Government, and Shariatulla to his against Jagat.

The appellants will be entitled to their costs in the remand order in this case both here and in the lower Court. The hearing fee is to be divided according to the respective shares.

S. M.

*Case remanded.*



**CRIMINAL REVISION.***Before Mr. Justice Holmwood and Mr. Justice Imam.*

EMPEROR

v.

SHEIKH IDOO\*

1912

May 24.

*Jurisdiction of Criminal Court—Order of discharge by the High Court in its original criminal jurisdiction if bar to fresh proceedings—Criminal Procedure Code (Act V of 1898), s. 190 (c)—Nolle prosequi—Practice.*

An order of discharge does not operate as a bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a police report, or under s. 190(c) of the Criminal Procedure Code.

*Mir Ahwad Hossein v. Mahomed Askari* (1) referred to.

ON an information laid by one Captain Clifford, on the 23rd of September, at the Entally *thanah*, the accused was sent up before the Chief Presidency Magistrate to take his trial for offences under ss. 333 and 366 of the Penal Code. On the 31st of January 1912, the Chief Presidency Magistrate committed the accused to the High Court Sessions under section 366 of the Penal Code.

At the Sessions an indictment was drawn up under sections 363, 366 and 376 of the Indian Penal Code; but before the accused was arraigned, an objection was taken to the trial of the offence under section 376 of the Penal Code, inasmuch as the Sessions Court had no jurisdiction to try the offence of rape which was committed, if at all, outside the local limits of the ordinary criminal jurisdiction of the High Court.

\* Criminal Revision, No. 532 of 1912, against the order of C. D. Ghose, Deputy Magistrate of Sealdah, dated April 13, 1912.

1912  
EMPEROR  
T.  
SHEIKH  
IDOO.

The Standing Counsel, on behalf of the Crown, intimated that he would not proceed with the charge under that section.

In course of the trial evidence disclosed the offence of rape, which the Sessions Court had no jurisdiction to try.

The Crown therefore decided to enter a *nolle prosequi*, through the Advocate-General, and the learned Judge thereupon discharged the accused.

The accused was subsequently placed on his trial under sections 363, 366 and 376 of the Penal Code before the Police Magistrate of Sealdah; the Magistrate was of the opinion that he could not proceed under sections 363 and 366, and wished only to proceed with the charge under section 376.

A Rule was thereupon obtained by the Standing Counsel to show cause why the trying Magistrate should not proceed with the case under the other two sections.

Mr. K. N. Chaudhuri (with him Babu Satish Chandra Ghose), in showing cause, submitted that the only method of instituting fresh proceedings on the same charges was, as in England, either on the exhibition of information by the Advocate-General, or by the order of the Court ordering the discharge of the accused. The proceedings in this case had been wrongly initiated, and it was not correct to say that the Police Magistrate of Sealdah had refused to proceed with all the charges, as he had only refused to go on with the charge of kidnapping.

The Standing Counsel (Mr. B. C. Mitter) (with him Babu Harendra Nath Mitter), for the Crown, submitted that the *nolle prosequi* entered by the Advocate-General referred to the then indictment, and was confined only to the proceedings before the Sessions Court.

There was nothing in the Code which was a bar to the reception of the complaint made by the Crown against the accused before the Sealdah Magistrate.

*Mr. K. N. Chowdhuri*, in reply, referred to *Dwarka Nath Mondul v. Beni Madhab Banerjee* (1) and *Mir Ahwad Hossein v. Mahomed Askari* (2).

*Cur adv. vult.*

HOLMWOOD AND IMAM JJ. We think that the question raised on this Rule can be simply answered by pointing out that the order of discharge made by Mr. Justice Stephen cannot be set aside by any tribunal and does not require to be set aside.

Upon all the authorities an order of discharge does not operate as any bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a Police report or under section 190 (c) of the Criminal Procedure Code. This was finally settled in the case of *Mir Ahwad Hossein v. Mahomed Askari* (2) by a Full Bench of this Court. If this is the rule of law in the case of Presidency and Provincial Magistrates, where the higher Courts have been specially empowered to interfere and order fresh enquiry, and if in these cases it is unnecessary to set aside the order of discharge or order fresh enquiry, *a fortiori* it is unnecessary in the case of discharge by the High Court in the exercise of its original criminal jurisdiction, where there is no authority that can interfere with the order of discharge. We do not order further enquiry in this case, since it is unnecessary. It is enough for us to lay down that the Magistrate is mistaken in declining jurisdiction which he undoubtedly has, and he is bound to consider and adjudicate on any criminal information properly laid before him against the accused.

S. K. B.

*Rule absolute.*

(1) (1900) I. L. R. 28 Calc. 652. (2) (1902) I. L. R. 29 Calc. 726.

1912  
EMPEROR  
v.  
SHEIKH  
IDOO.

**TESTAMENTARY JURISDICTION.***Before Mr. Justice Fletcher.*

1912

May 27.

*In the goods of WILLIAM RENNIE.\***Letters of Administration—Practice—Colonial Probates Act (55 & 56 Vict. c. 6)—Power-of-attorney, construction of.*

THE Colonial Probates Act and the procedure therein indicated *viz.* to send an exemplification of the probate granted in any part of the United Kingdom to be re-sealed by the Court to which it is sent, has not been extended to British India, where the practice is to require administration with will annexed to the estate of a deceased British subject leaving property there.

Authority in a power-of-attorney granted by the executrix of a will which has been confirmed in Scotland "to produce to the Supreme Court in India in the Probate jurisdiction at Calcutta or elsewhere in India the said confirmation and to procure the same to be sealed with the seal of the Supreme Court in India in accordance with the laws thereof" does not authorise the donee to obtain grant of Letters of Administration.

**APPLICATION.**

This was an application for grant of Letters of Administration with copy of the will annexed to the estate of one William Rennie, deceased.

William Rennie was a Marine Engineer in the service of the B. I. S. N. Co. and died in a shipwreck on the 7th November 1910. He was a Scotchman, domiciled in Scotland at the time of his death. On the 13th September 1910, Rennie had made and executed "a disposition and settlement and will and testament" appointing his wife his executrix and universal legatee. Confirmation was granted to the widow in the Court of the Sheriff of Dumbarton on the 1st July 1911 and was sealed with the seal of the Registry of

\* Testamentary Jurisdiction.

the Probate Division in England on the 8th August 1911.

For the purpose of realising the assets of the deceased in India, on the 9th September 1911, the widow granted a power or letter of attorney to the petitioner, authorising him "to be my lawful attorney for me and on my behalf to produce to the Supreme Court in India in the Probate jurisdiction at Calcutta or elsewhere in India the said confirmation under the seal of the said office and to procure the same to be sealed with the seal of the Supreme Court of India in accordance with the laws thereof, and I hereby authorise and empower my said attorney upon his having obtained such confirmation or other necessary instrument or instruments for me and in my name and in my behalf to ask, demand, recover, collect, gather in and receive all sums of money, stocks, shares, or property and all goods, chattels, estate and effects which may in any manner be outstanding, due, owing, belonging or appertaining to the estate of the said deceased William Rennie in India". The donee was further empowered to sell and dispose of the assets, to give discharges and acquittances and to do all things necessary for the purposes of the power: and there was a ratification clause.

The donee of the power applied for Letters of Administration with copy of the will annexed to the estate and effects of the testator in British India.

*Mr. Zorab*, for the petitioner. The intention of the power-of-attorney taken as a whole was to authorise the donee to do all such things as would be necessary for the purpose of realising the assets of the deceased: and reading it as such, there was the intention to authorise the donee to take out letters of administration. The words in the power "such confirmation or

1912

WILLIAM  
RENNIE,  
*In the goods  
of.*

1912

WILLIAM  
RENNIE,  
*In the goods  
of.*

other necessary instrument or instruments" would include letters of administration.

FLETCHER J. This is an application for a grant of Letters of Administration with will annexed to the estate of one William Rennie who was apparently a Marine Engineer employed in the B. I. S. Navigation Co. Ltd. The testator was a Scotchman, domiciled in Scotland at the time of his death. The Trust, Disposition and Settlement has been proved in the Court of the Sheriff of Dumbarton, and apparently confirmation of the Inventory has been granted by the Probate Division in England. The present application is for a grant of Letters of Administration with copy of the will annexed to the estate and effects of the deceased in British India. Now, in British India the practice differs from that of other parts of the British Empire. In other parts of the British Empire the Colonial Probates Act applies, and the practice is not to make a grant of Letters of Administration with copy of the will annexed but to send an exemplification of the Probate granted in any part of the United Kingdom, and this exemplification is re-sealed by the Court to which it is sent. The matter is of great convenience. It saves all the trouble of getting administration with will annexed and of obtaining sureties in the different colonies and dependencies of the Crown. That practice and Act have not been extended to British India, and the practice here is to require administration with will annexed to the estate of a deceased British subject who left property here. The question in this case is, are the words of the Power-of-Attorney sufficient to authorise a grant of Letters of Administration with the will annexed. When the matter was placed before me in chambers, I thought they were not, and, after having heard counsel on the matter, I am

not yet convinced they are. The draftsman obviously drew the Power-of-Attorney on the footing that the practice obtaining in other parts of the British Empire obtained in British India, because the donor of the Power-of-Attorney authorises the person appointed "to be my lawful attorney for me and on my behalf to produce to the Supreme Court in India in the Probate Jurisdiction at Calcutta or elsewhere in India the said confirmation under the seal of the said office and to procure the same to be sealed with the seal of the Supreme Court in India in accordance with the law thereof." That obviously does not authorise the Court to make a grant of Letters of Administration to the persons who are authorised to produce to the Court the confirmation of the Trust, Disposition and Settlement for the purpose of having it re-sealed at Calcutta. Then it is said, the next words in the power are sufficient to authorise a Court to make a grant of Letters of Administration to the will annexed. The words are as follows "I do hereby authorise and empower my said attorney upon his having obtained such confirmation or other necessary instrument or instruments for me and in my name and on my behalf to ask, demand, recover, collect, gather in and receive all sums of money, stock, shares or property and all goods, chattels, estate and effects which may in any manner be outstanding, due, owing, belonging or appertaining, to the estate of the said deceased William Rennie in India." It seems to me quite obvious these words do not authorise a grant of Letters of Administration with will annexed. What the clause authorises is to give receipts in the name of and on behalf of the person giving the power. If the document authorised the attorney to become the lawfully constituted legal personal representative of the deceased in British India, he would not give

1912

WILLIAM  
RENNIE,  
*In the goods  
of.*

FLETCHER J.

1912  
 WILLIAM  
 RENNIE,  
*In the goods  
 of.*  
 FLETCHER J.

receipts and discharges in the name of or on behalf of the donor of the power. He would give receipts as the constituted legal personal representative in British India. It seems to me that the words in this power are not sufficient to make a grant of Letters of Administration, and I must therefore refuse the application.

*Application refused.*

Attorneys for the petitioner: *Orr, Dignam & Co.*

J. C.

### INSOLVENCY JURISDICTION.

*Before Mr. Justice Fletcher.*

1912  
 May 30.

*In re* JEWANDAS JHAWAR\*

*Insolvency—Adjudication, effect of order of—Property situate at Delhi attached by order of District Court of Delhi—Title of Official Assignee—Presidency Towns Insolvency Act (III of 1909), ss. 17, 126—Auxiliary aid—Provincial Insolvency Act (III of 1907), s. 50.*

Under section 17 of the Presidency Towns Insolvency Act, on the making of an order of adjudication by this Court, the property of the insolvent situate in every part of British India vests in the Official Assignee of Bengal.

*Official Assignee, Bombay v. Registrar, Small Cause Court, Amritsar* (1) followed.

Where prior to the order of adjudication by this Court, certain properties at Delhi belonging to the insolvent, were attached under decrees of the District Court of Delhi, and the subsequent application of the Official Assignee of Bengal for realisation of the insolvent's assets so attached was refused by the District Judge, and the properties were thereafter sold in execution, and the sale proceeds brought into the District Court:

An order was made under section 126 of the Presidency Towns Insolvency Act, requesting the District Judge of Delhi to act in aid under section 50 of the Provincial Insolvency Act.

\*Insolvency Jurisdiction No. 13 of 1912.



Jewandas Jhawar was a merchant carrying on business in piece-goods in Calcutta and Delhi under the name of Assaram Jhawar. Certain suits were instituted against him in the Court of the District Judge of Delhi in respect of his Delhi business, amongst others the suit of *Nidharmull Naidarmul v. Assaram Jhawar*. Decrees were made in these suits, and in execution of the decrees, certain properties belonging to Jewandas Jhawar at Delhi, as well as his books of account of his Delhi business, were attached.

Subsequent to the attachment, on the 19th January 1912, Jewandas Jhawar was adjudicated an insolvent by order of the Insolvent Court in Calcutta, on the petition of certain Calcutta creditors, and on the 12th February the Official Assignee of Bengal applied to the District Judge of Delhi in the suit of *Nidharmull Naidarmull v. Assaram Jhawar* for an order that the attachment directed in that suit be withdrawn, and that the properties which had been so attached should be made over to himself.

On the 15th April 1912, this application was rejected, on the grounds that section 17 of the Presidency Towns Insolvency Act of 1909 did not apply to mofussil Courts, and that inasmuch as the properties had been attached previous to the order of adjudication, they could not vest in the Official Assignee.

On the 17th April, all the properties at Delhi which had been attached in the several suits were sold by order of the District Judge, and the sale-proceeds as well as the books of account were brought into Court.

Thereupon, the Official Assignee of Bengal applied to the Insolvent Court in Calcutta under section 126 of the Presidency Towns Insolvency Act of 1909 "to request the District Judge's Court of Delhi to act under section 50 of the Provincial Insolvency Act of

1912  
—  
JEWANDAS  
JHAWAR,  
In re.

1912  
JEWANDAS  
JHAWAR,  
*In re.*

1907, and to make over the said sale-proceeds as well as the said books of account of the insolvent's Delhi business to this Court, such assets to be held and applied by this court in such manner as it may think fit."

*Mr. S. C. Mookerjee*, for the petitioner. On the order of adjudication being made by this Court, all the property of the insolvent, wherever situate, including his assets at Delhi, vested in the Official Assignee of Bengal under section 17 of the Presidency Towns Insolvency Act. The District Judge of Delhi was in error in refusing the petitioner's application and in continuing with the proceedings in execution. The assets now in the custody of the Delhi Court should be made over to, and be held by, the Official Assignee for the benefit of the general body of the creditors of the insolvent. This Court has ample jurisdiction under section 126 of the Presidency Towns Insolvency Act of 1909 to make the order prayed for.

FLETCHER J. This is an application under section 126 of the Presidency Towns Insolvency Act of 1909 asking for an order that under section 126 and section 50 of the Provincial Insolvency Act of 1907 the District Court of Delhi should be asked to act as provided by those sections and to make over the sale proceeds of certain properties attached at Delhi to the Official Assignee. It appears that the Additional District Judge is of opinion that section 17 of the Presidency Towns Insolvency Act does not apply to the mofussil. In my opinion the Additional District Judge is clearly in error in that opinion. The Presidency Towns Insolvency Act is an Act of the Legislative Council of the Governor-General, and purports to vest the property of the insolvent wherever situate in the

Official Assignee. Clearly, therefore, section 17 vests the property of the insolvent in any part of British India in the Official Assignee. The wording is substantially the same as that of the Imperial Statute which was repealed by the present Act. The matter is covered by authority; for the Privy Council in the case of *Official Assignee, Bombay v. Registrar, Small Cause Court, Amritsar* (1) held that the effect of that Act was to vest the property in the Official Assignee notwithstanding the local legislation of the Punjab Council. It is clear that the assets in the Delhi Court belong to the Official Assignee. Why the Additional District Judge refused to follow the clear words of section 17, I do not understand. Perhaps if he is asked to act in aid under section 50 of the Provincial Insolvency Act and section 126 of the Presidency Towns Insolvency Act, he will see his way to make over the assets to the Official Assignee, who alone can grant a discharge therefor. The application is allowed, and an order to act in aid is made under section 126 of the Presidency Towns Insolvency Act and section 50 of the Provincial Insolvency Act.

*Application allowed.*

Attorney for the petitioner: *S. C. Mukerjee.*

J. C.

(1) (1910) I. L. R. 37 Calc. 418; L. R. 37 I. A. 86.

1912

JEWANDAS  
JAWAR,  
*In re.*

FLETCHER J.

## APPELLATE CIVIL.

*Before Justice Sir Cecil Brett and Mr. Justice N. R. Chatterjea.*

SHASHI BHUSHAN LAHIRI

v.

RAJENDRA NATH JOARDAR.\*

1912

May 17.

*Hindu law—Stridhan—Inheritance—Half-sister's son of Hindu widow—Probate, application for—Daughter's son of the great-grandson of the great-great-grandfather of the testatrix' husband whether preferential heir to half-sister's son.*

Under the Dayabhaga School of Hindu law a half-sister's son of a widow is heir to her *stridhan* property, in preference to the daughter's son of the great-grandson of the great-great-grandfather of her husband, and that therefore the latter has no *locus standi* to oppose an application for probate by the former, of a will alleged to have been executed by the said widow in regard to such property.

*Dasharathi Kundu v Bipin Behary Kunlu* (1) and *Bholanath Roy v. Rakhal Dass Mukherji* (2) referred to.

*Chatoo Kurmi v. Rajaram Tewari* (3) distinguished.

APPEAL by the opposite party (defendant), Sashi Bhushan Lahiri.

This appeal arose out of an application for probate of a will of one Adya Sundari Debi, deceased. The application was made on behalf of three persons, viz., Rajendra Nath Joardar, Jogendra Nath Joardar and Charu Chunder Chowdhury, who, it was alleged, were appointed executors by implication, and to whom the testatrix bequeathed her properties. Charoo Chunder was related to her as her half-sister's son. One Shashi

\* Appeal from original decree, No. 173 of 1909, against the decree of H. E. Ransom, District Judge of Nuddea, dated Feb. 6, 1909.

(1) (1904) I. L. R. 32 Calc. 261. (2) (1884) I. L. R. 11 Calc. 69.

(3) (1909) 11 C. L. J. 124.

Bhushan Lahiri, who was the daughter's son of the great-grandson of the great-great-grandfather of Adya Sundari's husband, citation having been issued upon him, appeared and put in a petition of objection stating that the will was a forgery, and that the estate did not belong to Adya Sundari but to her husband. The learned District Judge held that he was not entitled to oppose the grant of probate, and, after taking evidence of the execution of the will, granted probate to the applicants. Against this decision Shashi Bhushan Lahiri appealed to the High Court.

*Mr. B. L. Lahiri* (with him *Babu Norendra Kumar Bose, Babu Upendra Nath Bagchi* and *Babu Hira Lal Sanyal*), for the appellant. The Court below was wrong in holding that Shashi Bhushan had no *locus standi* to oppose the grant of probate. The property bequeathed belonged to the husband of the testatrix, but assuming that it was her *stridhan* property, yet the appellant, according to Hindu law, was the preferential heir to the half-sister's son, and as such he had a *locus standi* to oppose the application for probate. Rival wife's son is expressly mentioned as a son in the Dayabhaga (Chapter IV, section III, verse 32), and that if it had been meant to include the son of a sister of the half-blood in the expression "sister's son," it would have been so expressly stated. That being so, half-sister's son is not on the category of heirs, and therefore the appellant being the heir, could oppose the grant of probate. Moreover, citation was issued upon him; on that ground also he had a *locus standi*: *Chatoo Kurmi v. Rajaram Tewari*(1).

*Babu Golap Chandra Sarkar* (with him *Babu Sachindra Prosad Ghose*), for the respondents, was not called upon; but in the course of the argument of the learned counsel for the appellant, he referred to the

1912

SHASHI  
BHUSHAN  
LAHIRI  
v.  
RAJENDRA  
NATH  
JOARDAR.

(1) (1909) 11 C. L. J. 124.

1912

SHASHI  
BHUSHAN  
LAHIRI

v.

RAJENDRA  
NATH  
JOARDAR.

cases of *Dasharathi Kundu v. Bipin Behari Kundu* (1)  
and *Bhola Nath Roy v. Rakhal Dass Mukherji* (2).  
*Cur adv. vult.*

N. R. CHATTERJEA J. This appeal arises out of an application for probate of the will of one Adya Sundari Debi who bequeathed her properties to the three respondents who were her paternal relations and appointed them executors, one of them, Charu Chunder, being related to her as her half-sister's son. The appellant, Shashi Bhushan Lahiri, was the daughter's son of the great-grandson of the great-great-grandfather of Adya Sundari's husband, Ram Kanai Moitra. The appellant had applied for letters of administration to the estate left by Adya Sundari before the application for probate of her will was made by the respondents.

Therefore, in the proceedings on the application for probate citation was issued upon the appellant, and he put in a petition of objections contesting the genuineness and validity of the will, and also alleging that the estate belonged to Adya Sundari's husband which she had no power to dispose of by will. The learned District Judge held that he was not entitled to oppose the grant of probate, and, after taking formal evidence of the execution of the will, granted probate to the respondents. Shashi Bhushan has appealed to this Court.

Before Shashi Bhushan can contest the will, he must show that he has an interest in the estate of Adya Sundari. If the estate dealt with by the will belonged to her husband, the grant of probate of the will executed by her cannot affect the rights of the heir of her husband, and the Court of Probate of course has no power to go into the question whether the estate belonged to Adya Sundari or her husband.

(1) (1904) I. L. R. 32 Calc. 261.      (2) (1884) I. L. R. 11 Calc. 69.

It has accordingly been contended on behalf of the appellant, Shashi Bhushan, in this appeal, *first*, that assuming that the estate belonged to Adya Sundari over which she had a disposing power, the respondent Charu Chunder, as the half-sister's son of the deceased, was not her heir in preference to him, and *secondly*, that citation having been issued upon him, the Court below is wrong in holding that he had no *locus standi* to oppose the grant of probate.

The question therefore arises whether Charu Chunder, as the half-sister's son of the testatrix, is the heir to the *stridhan* of Adya Sundari. If he is, then the appellant, Shashi Bhushan, has no *locus standi* to contest the will.

The parties are governed by the Dayabhaga School of Hindu Law. The Dayabhaga, in dealing with the succession to the separate property of a childless woman after enumerating certain heirs down to the husband, says as follows:—"On failure of heirs down to the husband, this rule is again provided which Vrihaspati thus delivers:—"The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law and the wife of an elder brother are pronounced similar to mothers; if they leave no issue of their bodies, nor son [of a rival wife], nor daughter's son, nor son of those persons, the sister's son and the rest shall take their property" (see Dayabhaga, Chapter IV, section III, verse 31).

The sister's son is expressly named as an heir in the above text of Vrihaspati, and the only question is whether a half-sister's son is included in the expression "sister's son." This question was raised in the case of *Dasharathi Kundu v. Bipin Behari Kundu* (1), and it was held in that case that "sister's son" includes a half-sister's son, and that under the

(1) (1904) I. L. R. 32. Calc. 261.

1912  
SHASHI  
BHUSHAN  
LAHIRI  
v.  
RAJENDRA  
NATH  
JOARDAR.  
CHATTERJEE  
J.

1912

SHASHI  
BHUSHAN  
LAHIRI  
v.  
RAJENDRA  
NATH  
JOARDAR.

HATTERJEA  
J.

Dayabhaga a step-sister's son is entitled to succeed to a woman's *stridhan* in preference to her husband's elder brother. That is a direct authority against the appellant's contention. In that case the learned Judges, with reference to the translation of the expression "sister's son" in Vyavastha Darpana as own sister's son, pointed out that the author probably used the words "own sister's son" as contradistinguished from the woman's husband's sister's son who is the next in order in the table of succession. In the case of *Bholanath Roy v. Rakhal Dass Mukherji* (1) it was held that under the Bengal School of Hindu Law sons of sisters of the half-blood are entitled to succeed equally with sons of sisters of the whole blood to the property of a deceased brother. That case, no doubt, related to the question of succession to a male owner, but it is an authority for the proposition that the expression "sister's son" includes a half-sister's son, and that there is no difference between the son of a sister of the whole blood and the son of a sister of half-blood.

It is pointed out, however, on behalf of the appellant, that the rival wife's son is expressly mentioned as a son in the Dayabhaga (Chapter IV, section III, verse 32), and that if it had been meant to include the son of a sister of the half-blood in the expression "sister's son," it would have been expressly so stated. But no argument can be based upon this ground. The word 'brother' in the well known text of Yajnavalkya relating to the succession of a male owner dying without male issue is applicable to a brother of the whole blood as well as to a brother of the half-blood. The fact of being a male offspring of one common parent makes one a brother (*see* Sreekrishna's Commentary on the Dayabhaga, Chapter XI,



section V, paragraphs 7—12). There is, no doubt, a distinction between brothers of the whole blood and those of the half-blood, but the former confers a greater amount of spiritual benefit.

In the case of a sister's son, according to some authorities (*see* Colebrook's Digest Book V, chapter 8, section 1), there is no difference in the amount of spiritual benefit conferred by a full sister and a half-sister, respectively, and that therefore they inherit together; and, although a different view is taken by some other authorities, the above view is "respected and followed" (*see* Shyama Charan Sarkar's Vyavastha Darpana, 2nd edition, page 265). In the Dayakrama Sangraha, Chapter I, section X, verse I, in dealing with the question of succession to a male owner, Srikrishna Tarkalankar says:—"According to Acharjya Chudamoni, the son of the proprietor's own sister and the son of his half-sister have an equal right of inheritance." Srikrishna's recapitulation of the line of inheritance, in which a different view is alleged to have been taken, and the difference in the copies of the recapitulation were discussed in the case of *Bhola Nath Roy* (1) cited above, and it was there held that Srikrishna's opinion was the same as that of Acharya Chudamoni.

As already pointed out, it was held in the case of *Dasharathi Kundu v. Bipin Behari Kundu* (2) that the half-sister's son is entitled to succeed in preference to the husband's elder brother. Even if the half-sister's son does not stand in the same position as the full sister's son, he is entitled to succeed in preference to the appellant who is the daughter's son of the great-grandson of the great-great-grandfather of the deceased. The latter, accordingly, is not the heir of Adya Sundari and has no *locus standi*

1912

SHASHI  
BHUSHAN  
LAHIRI

v.

RAJENDRA  
NATH  
JOARDAR.CHATTERJEA  
J.

(1) (1884) I. L. R. 11 Calc. 69.

(2) (1904) I. L. R. 32 Calc. 261.

1912  
 SHASHI  
 BHUSHAN  
 LAHRI  
 v.  
 RAJENDRA  
 NATH  
 JOARDAR.  
 CHATTERJEE  
 J.

to oppose the grant of probate. This disposes of the first contention.

The second contention also has no force. The mere fact that it was stated in the application for probate that the appellant had applied for letters of administration to the estate of the testatrix and that the Court had issued a citation upon him, would not entitle him to come in and oppose the grant of probate, if it is found that he has no interest in the estate of the deceased. The case of *Chatoo Kurmi v. Rajaram Tewari*(1), relied on by the appellant, has no application to the facts of the present case. There the relationship of the caveator with the testatrix was admitted, and the caveator would have succeeded if it had been proved that the testatrix was not a degraded woman. He wanted to cross-examine the witnesses for the petitioner for probate to show that the deceased was not degraded; his title to succeed depended upon the question whether the woman was degraded or not, he was a party to the proceeding and he had certainly a right to cross-examine the witnesses. In the present case Charu Chunder being the heir of Adya Sundari had she died intestate, the appellant had no interest in her estate and had no *locus standi* to contest the will.

The appeal accordingly fails and is dismissed with costs.

BRETT J. I agree.

S. C. G.

*Appeal dismissed.*

## PRIVY COUNCIL.

BHAWANI KUWAR

v.

MATHURA PRASAD SINGH.\*

P.C.\*  
1912June 25, 26,  
27 ;  
July 22.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

*Sale for arrears of revenue—Act XI of 1859, sections 53, 54—Purchase by mortgagee in execution of his mortgage decree of the mortgaged property—Subsequent arrears of revenue and sale for such arrears—Liability of Purchaser in execution of decree of Civil Court—Rights of purchaser at sale for arrears of revenue.*

Section 54 of Act XI of 1859 enacts that when a share of an estate is sold "the purchaser shall acquire the share subject to all incumbrances, and shall not acquire any rights which were not possessed by the previous owner."

On 9th August 1886 a mortgage was granted in favour of the respondent over a certain share in 4 out of 71 villages. On 31st May he obtained a decree on his mortgage which was made absolute on 19th December 1899. He executed his decree and a sale took place on 19th March 1900, at which the respondent himself became the purchaser. On 28th March an instalment of Government revenue on the 71 villages fell into arrear, and the whole residuary share of 71 villages, including the 4 villages purchased by the respondent, was notified for sale. The respondent did not pay the revenue due, but on 23rd April he obtained a certificate confirming the sale of 19th March in execution of his decree. On 6th June 1900 the whole of the villages was sold for arrears of revenue and was purchased by the predecessor in title of the appellant. In a suit against the respondent for the share purchased at the execution sale :—

*Held* by the Judicial Committee (reversing the decision of the High Court), that the sale in execution of the mortgage decree took effect from the actual date of the sale, and not from its confirmation, and, therefore, from 19th March 1900 the respondent by his purchase became the proprietor of the estate sold, and not merely the purchaser of such right, title and interest in it as the mortgagor might have had. He was, therefore, notwithstanding the provisions of section 54 of Act XI of 1859 (which

\* *Present* : LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

1912  
—  
BHAWANI  
KUWAR  
v.  
MATHURA  
PRASAD  
SINGH.

in fact rather confirmed the view taken), not in a position to maintain as against himself, or as against third parties unconnected with mortgage transactions upon the property, the position that his mortgage still remained an incumbrance thereon. That incumbrance had become extinct by the mortgagee's overriding right when he became complete owner of the lands. To keep it alive, as the respondent sought to do, would introduce confusion into the mechanism of transfer and insecurity into the rights in immoveable property which were not warranted by the Act.

APPEAL from a decree (10th January 1908) of the High Court at Calcutta, which reversed a decree (27th January 1905) of the Subordinate Judge of Gaya.

The plaintiff was appellant to His Majesty in Council.

The suit which gave rise to this appeal was brought against Mathura Prasad Singh and two *pro forma* defendants to obtain possession of a 5-anna and  $1\frac{1}{2}$  pies share of four villages named Kollhna, Khutowra, Khardih and Nawalchak, which had been on 9th August 1886 mortgaged by one Mahomed Baksh and others to the defendant Mathura Prasad Singh. These four villages were part of a "residue" share in 71 villages owned by the mortgagors in an estate called Azamgarh in the district of Gaya.

On 31st May 1899, Mathura Prasad Singh obtained on his mortgage bond a decree which was made absolute on 19th December 1899. The mortgagee executed his decree and purchased the mortgaged property at the sale on 19th March 1900. The sale was confirmed on 23rd April 1900 and a sale certificate was granted on 12th July; and on 18th December 1900 his name was registered as proprietor of the property in suit.

On 29th March 1900, the residue share fell into arrear for the March instalment of Government revenue amounting to Rs. 1,554-3, and was notified for sale by the Collector. On 6th June 1900, the whole of

that share was sold and purchased in the name of the second defendant by the third defendant. The second defendant obtained a sale certificate dated 3rd April 1901, and possession was delivered to him on 5th July 1901.

1912  
BHAWANI  
KUWAR  
v.  
MATHURA  
PRASAD  
SINGH.

On 15th July 1901, the second defendant executed an agreement in favour of the third defendant admitting the latter to be the real purchaser, and on the application of the third defendant to the Sub-Deputy Collector's Court his name was registered as owner of the whole of the residue share. The first defendant Mathura Prasad Singh, however, appealed from the order of the Sub-Deputy Collector to the Collector of the district, who set it aside on 21st January 1902, and on a further appeal that decision was upheld by the Commissioner on 31st May 1902. Subsequently, on 20th September 1902, the third defendant conveyed, by a deed of gift, the property to his wife, the plaintiff, who on 31st March 1904 brought the present suit against the first defendant for possession of the share that defendant had purchased in execution of his mortgage decree, and in respect of which he had been registered as proprietor. The plaintiff prayed that her name might be entered in the Land Registration office as proprietor of the property in suit, and for mesne profits up to the date of the delivery of possession.

The defence of the first defendant was, *inter alia*, that the rights which the predecessor in title of the plaintiff acquired by his purchase at the revenue sale were governed by the provisions of section 54 of Act XI of 1859; that the residue share was sold subject to all incumbrances existing on 28th March 1900, the date of the default in payment of the Government revenue, and that, on that date the property in suit was subject to a debt of Rs. 18,973-6-3 due on the mortgage to the defendant; that the property in suit

1912  
 BHAWANI  
 KUWAR  
 v.  
 MATHURA  
 PRASAD  
 SINGH.

was purchased by the defendant for Rs. 9,200, leaving Rs. 9,773-6-3 still due on the mortgage decree, and until the plaintiff redeemed the mortgage by paying off the whole sum due under the defendant's decree, she could not claim possession of the property in suit; and that as the proceedings which terminated in the sale for arrears of revenue were taken during the pendency of the execution of the defendant's decree, the doctrine of *lis pendens* applied, and the plaintiff's purchase of the property in suit was, under the circumstances, wholly void.

Issues were settled, of which only the following were material on this appeal:

"2nd.—Whether the revenue sale of the ijmal share of Taluka Azamgarh has extinguished all the rights of the defendant No. 1 under the mortgage decree and under auction-purchase in execution of that decree,

"3rd.—Was the defendant No. 1 bound to pay the Government revenue for the March kist 1900? And was the defendant No. 1 aware of the property being in arrear?

"4th.—What incumbrance, if any, the defendant No. 1 had on the disputed property? And whether the plaintiff is entitled to recover possession of the disputed property without paying with interest the amount of incumbrance due to the defendant No. 1 from Mahomed Baksh Khan?"

The Subordinate Judge held on the 2nd and 4th of these issues that at the sale for arrears of revenue what was sold was the right, title, and interest of the defaulters as it existed at the time of the default, or of the sale, and that on 6th June 1900, the date of the revenue sale, the mortgagors had no title in the four villages which had been purchased by the first defendant in execution of his mortgage decree; and

therefore that the revenue sale of the ijmalī share did not extinguish the right of the first defendant under his auction-purchase. He also decided on issue 3rd that though the first defendant purchased the properties in suit on 19th March 1900, his title was not perfected until the 23rd April 1900 when the sale was confirmed, and therefore the mortgagors and not the first defendant were bound to pay the Government revenue, that the Government revenue on the whole ijmalī share was Rs. 4,000, and the arrears for which the estate was sold were Rs. 1,554-0-4; the revenue on the share in the four villages which the first defendant purchased was only Rs. 79; and that even if he was aware of the default, the first defendant could not be expected to pay the whole of the revenue due. The result was that the Subordinate Judge dismissed the suit with costs.

An appeal by the plaintiff to the High Court came before a Divisional Bench consisting of BRETT and MOOKERJEE JJ. who delivered separate judgments in which they differed from the decision of the Subordinate Judge, and came to the conclusion that the proper decree was one for possession of the property in suit subject to the plaintiff discharging the mortgage debt due to the first defendant.

BRETT J. (after stating that the three main contentions advanced on behalf of the plaintiff were (1st) that the decree on the mortgage having been made absolute before the arrears of revenue fell due, there was no encumbrance in existence on 29th March 1900 when the ijmalī share was found to be in default: (2nd) assuming that section 316 Civil Procedure Code, 1882, governs sales under the Transfer of Property Act, the title to the shares in the four villages sold in execution of the mortgage decree became vested in the mortgagee (the first defendant) on 19th March 1900

1912

BHAWANI  
KUWAR

v.

MATHURA  
PRASAD  
SINGH.

1912  
 BHAWANI  
 KUWAR  
 v.  
 MATHURA  
 PRASAD  
 SINGH.

when the property was sold to him, and not on 23rd April 1900 when the sale was confirmed; and (3rd) that the first defendant had ceased to be a mortgagee, and had become an owner of the property at the time of the revenue sale on 6th June 1900, and therefore under that sale all his rights passed to the purchaser continued:—

“The ijmal share was sold for arrears of revenue under the provisions of section 13 of Act XI of 1859 and the purchaser at that sale acquired (under section 54 of the same Act) the share subject to all incumbrances and did not acquire any rights which were not possessed by the previous owner or owners. I am unable to accept the view which the Subordinate Judge has taken that what was sold at the revenue sale was the right, title, and interest only of the defaulters. Such a view is contrary to the whole policy of the Revenue Law, and is opposed to the decisions of this Court in the cases of *Gungadeen Misser v. Kheeroo Mundul* (1), *Debi Das Chowdhuri v. Bipro Charan Ghosal* (2), and *Annoda Prosad Ghose v. Rajendra Kumar Ghose* (3), which clearly show that what was sold was the share subject to encumbrances.

“The main question for determination then in this case is whether the mortgage by the defaulters to the first defendant was an incumbrance subject to which the share was sold, or had it ceased to exist as an incumbrance by reason of the purchase by the first defendant of the mortgaged properties on 19th March 1900, prior to the date of default, which purchase was confirmed on the 23rd April following.

“The case put forward for the defendants has been that the mortgage did not cease to exist as an incumbrance when the order absolute was obtained in the mortgage suit; that under the provisions of section 316, Civil Procedure Code the title to the property sold vested in the first defendant as against the mortgagor and persons claiming through or under him from the date of the sale certificate; that up to the date of such certificate the title of the first defendant as owner was inchoate and incomplete, and in fact subject to be lost; that until the sale was confirmed he was entitled to rely on his mortgage; that what was sold at the revenue sale was the property as it existed at the time of the default, and that at the time of the default the mortgage of the first defendant was an existing incumbrance. In support of these contentions reference has been made to section 28 of Act XI of 1859 and Schedule A, as showing that the title of the purchaser

(1) (1874) 14 B. L. R. 170.

(2) (1895) I. L. R. 22 Calc. 641.

(3) (1901) I. L. R. 29 Calc. 223.



at a revenue sale relates back to the date of default and it has been argued on this basis that the property purchased must be the property in suit as it existed at the date of the default.

"The first two points which have been advanced in support of the appeal may be considered together. It has been contended that the right of a purchaser to property sold in execution of a decree of the Civil Court accrues from the date of the sale, though it may not be complete till after confirmation, and in support of this view the cases of *Bhyrub Chunder Bundopadhyaya v. Soudamini Debi* (1), *Dagdu v. Pancham Singh Gangaram* (2), and *Adhur Chunder Banerjee v. Aghore Nath Aroo* (3), are relied on.

"No doubt these cases are ample authority for the contention that the title of the purchaser at an auction sale in a Civil Court will relate back from the date of confirmation to the date of sale so as to defeat all intermediate incumbrances or alienations, but these cases do not help us to determine whether what was sold at the revenue sale was the share as it existed on the date of default or on the date of actual sale. The cases of *Umataru Gupta v. Uma Charan Sen* (4) and *Chowdhry Jogessur Mullick v. Khetter Mohun Pal* (5), to which we have been referred, no doubt, lay down that a purchaser of an estate at a sale for arrears of Government revenue is not affected by any incumbrances or alienations created by the defaulter between the date of default and the date of sale, as under section 28 of Act XI of 1859 the title to the estate vests in the purchaser from the date of default. But in the present case, the question for determination depends not so much on the date when the title of the purchaser at the revenue sale vested as on the date when, if at all, the mortgage or incumbrance on the estate held by defendant No. 1 ceased to exist. Nor does the decision of the Full Bench of this Court in the case of *Bibijan Bibi v. Sachi Bewa* (6), to which we have been referred, seem to me to assist us in determining the question which is before us. That case hardly supports the present contention of the appellant that the mortgage lien of the first defendant on the property, which he purchased on the 19th March 1900 in execution of his mortgage decree, was extinguished before his sale had been confirmed.

"I am unable, therefore, to hold that the two first contentions advanced on behalf of the plaintiff have been maintained. The case of *Prem Chand Pal v. Purnima Dasi* (7), on the other hand, goes to support the contention

1912

BHAWANI  
KUWAR  
v.  
MATHURA  
PRASAD  
SINGH.

(1) (1876) I. L. R. 2 Calc. 141.

(2) (1892) I. L. R. 17 Bom. 375.

(3) (1898) 2 C. W. N. 589.

(4) (1904) 3 Calc. L. J. 52.

(5) (1889) I. L. R. 17 Calc. 148.

(6) (1904) I. L. R. 31 Calc. 863.

(7) (1888) I. L. R. 15 Calc. 546.

1912  
 BHAWANI  
 KUWAR  
 v.  
 MATHURA  
 PRASAD  
 SINGH.

of the defendants, that on the date when the share fell into arrears for Government revenue the share was subject to the unconfirmed sale held in execution of the mortgage decree, and that the unconfirmed sale constituted an incumbrance on the mortgage property which formed part of the share sold.

"The third contention however raises a question of much difficulty and importance, *viz.*, whether because the sale to the first defendant had been confirmed on the 23rd April 1900, he became in consequence an owner of the property at the time of the revenue sale on the 6th June 1900, and therefore under that sale all his rights passed to the purchaser. In support of this contention reliance has been placed for the plaintiff on the decision of this Court in the case of *Amuda Prosad Ghose v. Rajendra Kumar Ghose* (1) and the decision of their Lordships of the Privy Council in the case of *Shyam Kumari v. Rameswar Singh* (2)."

After distinguishing those cases from the present one, the judgment continued :—

"The effect of applying to the present case the principle contended for on behalf of the appellant would apparently be to discharge the mortgage of the first defendant leaving him, as proprietor of the share in the four villages out of the 71 villages which made up the *ijmali kalam* which was sold for arrears of revenue, a share in the sale-proceeds, which would bear to the whole proceeds the same proportion as the value of the share in the 4 villages bears to the value of the whole *ijmali kalam*. The property at the revenue sale sold for Rs. 13,100, and such a share would cover only a small portion of the mortgage debt which was due to the first defendant under his decree.

"It has been held in the present case that the mortgage of the first defendant was a valid transaction for consideration. In due course he brought his suit to recover the debt due under the mortgage, obtained a decree and sold up and himself purchased the mortgaged property in part satisfaction of his debt. Subsequently, but prior to confirmation of his sale the property fell into arrears, a fact of which he appears to have been in ignorance, and his sale was confirmed before the property was brought up for sale for arrears of revenue. Apparently all the acts of the first defendant were perfectly *bonâ fide* and honest, while as to the acts of the other side, the Subordinate Judge, on the evidence, expresses some suspicion. The purchaser at the revenue sale claims to be entitled to recover possession of the mortgaged property purchased by the defendant on the ground

(1) (1901) I. L. R. 29 Calc. 223. (2) (1904) I. L. R. 32 Calc. 27.  
 I. R. 31 I. A. 176.

that at the time of the revenue sale the defendant was a part-proprietor. If the claim be allowed, the result will be that the first defendant having sued on his mortgage and executed his decree, will not be able to sue again on the mortgage deed. A portion of the amount recovered under the decree he may, as part-proprietor of the *ijmali kalam*, be able to realize out of the sale-proceeds, and the balance of the decretal amount not recovered at the sale he may be able to realize by a personal decree under section 90 of the Transfer of Property Act against the mortgagors.

"The result then of accepting as the date on which the title of the purchaser at the revenue sale in the present case vested the date on which the sale actually took place, would be to cause the first defendant a serious loss for which he cannot be held to be responsible, as he was ignorant that the share was in default when he made the purchase.

"In the case before their Lordships of the Privy Council, the respondent, who purchased at the revenue sale, was aware that he had previously purchased the property in execution of the decree on his mortgage.

"If, on the other hand, the provisions of section 28 and of schedule A of the Act be accepted as determining the date from which the title of the plaintiff's vendor, as purchaser at the revenue sale, vested, the first defendant will be protected from what appears to be nothing less than serious injustice."

MOOKERJEE J., whose judgment was to the same effect, summarised his conclusions briefly as follows:—

"(i) The view taken by the Subordinate Judge that the purchaser at the revenue sale purchased merely the right, title, and interest of the defaulting proprietor on the date of sale, and consequently purchased nothing, because his interest had already passed to the defendant, is not well founded; (ii) the view put forward on behalf of the appellant that as the purchase of the defendant at the mortgage sale had been confirmed before the revenue sale, the effect of the revenue sale was completely to extinguish his title and vest it in the purchaser at the revenue sale is equally unfounded; (iii) the view put forward by the appellant that the title of the defendant under his purchase at the mortgage sale was perfected with effect from the date of the sale is not well founded; (iv) although the purchase of the defendant at the mortgage sale was confirmed before the revenue sale, yet as it was confirmed after default and without any knowledge on the part of the defendant that default had been made, the defendant is entitled to rely upon his mortgage and use it as a shield for his protection against the purchaser at the revenue sale."

Both the learned Judges also held that the first defendant had, notwithstanding his purchase of the

1912

BHAWANI  
KUWAR

v.

MATHURA  
PRASAD  
SINGH.

1912  
 BHAWANI  
 KUWAR  
 v.  
 MATHURA  
 PRASAD  
 SINGH.

properties in suit in execution, an equitable right to keep his mortgage alive, and to treat it as a subsisting incumbrance in the said properties, and that the plaintiff's purchase was subject thereto; and passed a decree as above stated.

On this appeal,

*De Gruyther, K.C.*, and *G.R. Lowndes*, for the appellant, contended that the respondent's mortgage was not, at the date of the revenue sale on which the appellant's title was based, an incumbrance upon the properties in suit within the meaning of section 54 of Act XI of 1859; and that the respondent had no equitable right, after his purchase of the properties in suit in execution of his mortgaged decree to treat his mortgage as a subsisting incumbrance. Liability accrued as against the auction-purchaser from the date of the sale, and not from the date of the certificate of sale, and at the date of the revenue sale to the appellant the respondent was the proprietor of the purchased properties and all his interest became extinguished by the sale and passed to the purchaser (the appellant). Reference was made to Act XI of 1859, sections 10, 13, 14, 28, 53 and 54, and Schedule A: *Bhyrub Chunder Bundovadhya v. Soudaminee Dabee* (1), *Chatraput Singh v. Grindra Chunder Roy* (2), Civil Procedure Code (Act XIV of 1882) section 316, *Shyam Kumari v. Rameswar Singh* (3), *Gokaldas Gopaldas v. Puranmal Premasukhdas* (4), *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh* (5), Civil Procedure Code (Act V of 1908)

- (1) (1876) I. L. R. 2 Calc. 141, 145. (4) (1884) I. L. R. 10 Calc. 1035 :  
 (2) (1880) I. L. R. 6 Calc. 389. L. R. 11 I. A. 126.  
 (3) (1904) I. L. R. 32 Calc. 27, (5) (1911) I. L. R. 39 Calc. 527, 555 :  
 37, 38, 39 : L. R. 31 I. A. L. R. 39 I. A. 68, 81.  
 176, 183, 185, 186.

section 65, *Abdool Bari v. Ramdass Coondoo* (1), *Dagdu v. Panchamsingh Gangaram* (2), *Adhur Chunder Banerjee v. Aghore Nath Aroo* (3), Transfer of Property Act (IV of 1882) section 89, *Bibi'an Bibi v. Sachi Bewah* (4). [MR. AMIR ALI referred to section 65 of Civil Procedure Code, 1908, and Order XXI rule 94 which, he said, appeared to leave the matter as it was under Act XIV of 1882.] The argument for the respondent was one which this Board rejected in *Shyam Kumari v. Rameswar Singh* (5), and should be rejected now. Even if the respondent had any such equitable right as the High Court allowed him, it did not extend to repayment by the appellant of the whole amount of his mortgage, but must in any case be restricted to repayment of the sum which the mortgaged properties had realised in execution.

*Ross*, for the respondent, contended mainly for the reasons, and on the grounds, on which the judgments of the High Court were based, that the liability of the purchaser (respondent) accrued only from the date of the certificate of sale, and that he was entitled to rely upon his mortgage, and use it as a shield for his protection against the purchaser at the revenue sale; and that the appellant was, therefore, not entitled to the relief he claimed. Reference was made to Act XI of 1859 section 28: *Shyam Kumari v. Rameswar Singh* (5) as to the time when the sale takes effect; Civil Procedure Code (Act XIV of 1882) section 316; and *Gokaldas Gopaldas v. Puranmal Premsukhdas* (6).

*De Gruyther K. C.* replied referring to the Limitation Act (XV of 1877) Schedule II, Article 109; and Roscoe's *Nisi Prius* (Ed. 18th) 135, 136, 140.

1912

BHAWANI  
KUWAR  
v.  
MATHURA  
PRASAD  
SINGH.

- |  |                                       |
|--|---------------------------------------|
| (1) (1878) I. L. R. 4 Calc. 607.       | (5) (1904) I. L. R. 32 Calc. 27, 38 : |
| (2) (1892) I. L. R. 17 Bom. 375.       | L. R. 31 I. A. 176, 186.              |
| (3) (1898) 2 C. W. N. 589.             | (6) (1884) I. L. R. 10 Calc. 1035 :   |
| (4) (1904) I. L. R. 31 Calc. 863, 868. | L. R. 11 I. A. 126.                   |

1912

BHAWANI  
KUWAR  
v.  
MATHURA  
PRASAD  
SINGH.

The judgment of their Lordships was delivered by LORD SHAW. This is an appeal from a judgment and decree of the High Court of Calcutta, dated the 10th January 1908, which set aside a decree of the Subordinate Judge of Gaya in Bengal, dated the 27th January 1905.

The suit was brought by the appellant as plaintiff to obtain possession of a certain share, amounting to 5 annas  $1\frac{1}{2}$  pies, in four villages in the Gaya district which are named in the plaint. The appellant's rights are those of a purchaser who bought these properties at a revenue sale,—that is to say, a sale for arrears of revenue. The appellant pleads that he has received, in his character of purchaser and as from the date of sale, a right which cannot be defeated by the respondent. The respondent was a mortgagee holding a security over the property for money lent thereon, and in respect of this loan the property was sold in execution to him. It is out of this conflict between the rights of the former, who may be called the revenue vendee, and the latter, who was mortgagee and purchaser at the execution sale, that the suit has arisen.

As their Lordships are unable to agree with the views which have been taken with regard to this case, either by the Subordinate Judge or by the High Court, it is necessary to mention certain dates which are material, and to test crucially what were the rights of parties at those dates.

On the 9th August 1886 a mortgage for Rs. 5,000 was granted in favour of the respondent over the shares aforesaid of four out of seventy-one villages. On the 31st May 1899 the respondent obtained a decree on his mortgage bond, which was made absolute on the following 19th December. He executed his decree, a sale in the ordinary course took place, and on the

19th March, which is the first important date in the case, the mortgaged property was sold, and it was purchased by himself, the mortgagee.

1912

BHAWANI  
KUWAR

P.

MATHURA  
PRASAD  
SINGH.

Nine days thereafter, namely, on the 28th March 1900, the March instalment of Government revenue on the 71 villages, amounting to Rs. 1,554, fell into arrear, and the whole, including the four which had just been purchased by the mortgagee, were notified for sale by the Collector. The situation of matters accordingly then was that, so far as the ownership of the property was concerned, a transaction of sale thereof in favour of the mortgagee as purchaser had in point of fact taken place, and this at a time when, by the use of the ordinary information available as public facts, or upon enquiry with regard to the property purchased, it would have been found that the period of the falling due of revenue was almost at hand, and that proceedings preliminary to a sale in respect of arrears then left unpaid would inevitably be commenced.

The mortgagee, however, did not pay the revenue which fell due at the end of March. Without doing so, he went forward with proceedings to get the sale to himself in execution of the mortgage confirmed. On the 23rd April he obtained a certificate confirming the sale, the certificate bearing that he "has been declared the purchaser at sale by public auction on the 19th March, 1900 . . . and that the said sale has been duly confirmed by this Court on the 23rd April 1900."

It was maintained in argument for the mortgagee that the true meaning of this was that the sale to him did not become a legal fact until the 23rd April. In their Lordships' opinion, this is an under-statement and a mis-statement of the mortgagee's rights. It is true that upon that date the sale was confirmed, but

1912

BHAWANI  
KUWAR

v.

MATHURA  
PRASAD  
SINGH.

what was, as the certificate bears, confirmed, was a sale "by public auction on the 19th March 1900." There seems little reason to doubt that upon the 19th March all the lands sold had been transferred to the mortgagee, and that if there had been any accretions to the property between that date and the date of confirmation, those accretions would have become the property of the purchaser. On the other hand, there seems no legal principle which would leave untransferred to the mortgagee any obligations which arose during the same period. Furthermore, if the properties which were the subject of sale were liable to attachment for sums due from the lands as revenue, and falling into arrear subsequent to the actual date of sale, namely, the 19th March 1900, it was not within the legal right of the mortgagee on the one hand to claim as against the mortgagor that the ownership of the property had been transferred, and at the same time to claim against the Government, or in respect of third parties unconnected with either mortgagor or mortgagee, that the mortgagor had not transferred the rights of ownership to the mortgagee, but himself remained in the position of owner. For the mortgagee to be permitted to say to the mortgagor that the ownership had been transferred, and to say to an outsider, like the Collector of Revenue, that the ownership had not been transferred, is a conclusion not supported by good sense and, in the opinion of their Lordships, they are not forced to it by any canon or rule of law.

If the date of sale be taken as the true and actual date in fact, which, in their Lordships' opinion, was, as explained, the 19th March 1900, it appears to their Lordships equally clear that what was in fact then sold was the estate itself and nothing other or less than this which might be denominated by the terms



"right, title, or interest" of the mortgagor only, or the like. And it would seem to follow as a necessary consequence that when the mortgagee thus became the purchaser and owner of the subjects mortgaged, he was not in a position to maintain as against himself, or as against third parties unconnected with mortgage transactions upon the property, the position that his mortgage still remained an incumbrance thereon.

In their Lordships' opinion it is clearly unsafe to apply considerations as to the rights of prior and succeeding mortgagees to questions like the present. For in the present case no question arises as between a first and succeeding mortgagee, and no right or duty emerges with regard to the avoidance of an inequitable priority alleged to arise inferentially by acquisition of the estate. On the 19th March 1900, the crucial date in question, there were no interests of any kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such.

In these circumstances, when the 29th March 1900 was reached, the property which fell then into arrear of revenue and became liable to subsequent sale was the property in fact and in law of no one but the purchaser, namely, the mortgagee. It is admitted,—the concession was logically unavoidable,—that if at the sale on the 19th March the mortgagee himself had not purchased, but a stranger or outsider had, then such purchaser would have stood liable for the obligations accruing on the property and been responsible to Government for the payment of revenue and for the consequences which would ensue if the revenue fell into arrear. It seems somewhat difficult to discern why these consequences, which would be inevitable in the case of a stranger purchaser, should be avoided because the mortgagee was purchaser himself.

1912  
BHAWANI  
KUWAR  
v.  
MATHURA  
PRASAD  
SINGH.

1912

BHAWANI  
KUWAR  
v.  
MATHURA  
PRASAD  
SINGH.

The above considerations seem substantially to dispose of the whole case and lead their Lordships to a conclusion the opposite of that reached by the High Court, who think that it was possible for a mortgagee to maintain the ownership of the property in himself with an incumbrance which he should use to defeat, or, to use the term which the learned Judges employ, as a "shield against" the rights of third parties.

Upon this subject it is true that the language of section 54 of the Act No. XI of 1859—the Bengal Statute as to Sales of Land for Arrears of Revenue—provides that when a share or shares of an estate may be sold "the purchaser shall acquire the share or shares subject to all incumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners." This provision, however, appears to their Lordships—(i) to confirm the view that what is taken by a revenue vendee is nothing less nor more than what belonged to the former owner, and (ii) to negative the idea that it is open to an owner to protect himself as by "a shield" against the consequences of that full transfer by keeping incumbrances alive against the revenue vendee. These incumbrances had become extinct and lost in the mortgagee's overriding right when he became the complete owner of the lands. To keep them alive as sought would introduce confusion into the mechanism of transfer and an insecurity into the rights in real estate which are not warranted by the Act.

Their Lordships will humbly advise His Majesty that the judgments of the Courts below be reversed, and that the plaintiff be declared entitled to the lands in suit in terms of the plaint, that possession be delivered to the appellant of the properties in dispute the possession of the respondent being removed, that the name of the plaintiff be caused to be entered in the

Land Registration Office accordingly, the name of the defendant being expunged and his illegal possession removed, and that the cause be remitted to the High Court for the ascertainment of mesne profits for the period of dispossession up to the date of delivery of possession and for a decree therefor against the respondent. The respondent will pay the costs both here and in the Courts below.

1912  
 BHAWANI  
 KUWAR  
*v.*  
 MATHURA  
 PRASAD  
 SINGH.

*Appeal allowed.*

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent: *Watkins & Hunter.*

J. V. W.

## CRIMINAL REVISION.

*Before Mr. Justice Holmwood and Mr. Justice Imam.*

SHEOBALAK RAI

*v.*

BHAGWAT PANDEY.\*

1912  
 June 7.

*Attachment—Criminal Procedure Code (Act V of 1898), ss. 146 and 148—  
 Refusal to grant time—Duties of the Magistrate—Practice.*

It is only when the magistrate decides that none of the parties was in possession or is unable to satisfy himself as to which of them is in possession that he can attach property under Sec. 146 of the Criminal Procedure Code. He cannot say that he is unable to satisfy himself if he has never made the slightest effort to do so.

*Mansar Ali v. Matiullah (1) followed.*

*Bejoy Madhub Chowdhury v. Chandra Nath Chuckerbitty (2) distinguished.*

ON the 4th of January 1912, proceedings under s. 145 of the Criminal Procedure Code, were drawn up by

\* Criminal Revision No. 560 of 1912, against the order of U. Sen Gupta, Deputy Magistrate of Shahabad, dated March 6, 1912.

(1) (1908) 12 C. W. N. 896.

(2) (1909) 14 C. W. N. 80.

1912  
SHEOBALAK  
RAI  
v.  
BHAGWAT  
PANDEY.

the Magistrate in charge (district Arrah) against the petitioners, and the 2nd party in respect of a certain plot of land.

The case was fixed for the 16th of January but as neither the petitioners, Sheobalak Rai and others, nor the 2nd party filed their written statement, the magistrate, pending final decision, attached the land in dispute, and adjourned the case to the 30th of January.

On the 30th of January, the 2nd party filed their written statement and took exception to the proceedings on the ground that the land in dispute did not lie within the jurisdiction of the trying Magistrate.

Thereupon, the Magistrate directed the police to report whether it was so and fixed the case for the 10th of February. On the 10th of February, the case was again adjourned till the 21st. On the 21st, upon application of the parties for time to produce documents, the Magistrate adjourned the case till the 6th of March.

On the 6th of March, application for further time was made but the Magistrate refused the application, attached the land in dispute and directed the police to gather the crops standing on it.

Against that order of the Magistrate, the 1st party moved the High Court and obtained this Rule.

*Babu Chandrasekhar Prosad Singh and Jyotish Chandra Bose*, for the petitioners.

*The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown.

HOLMWOOD AND IMAM JJ. This was a Rule calling on the District Magistrate of Shahabad to show cause why the order under section 146 of the Criminal Procedure Code should not be set aside as wholly without jurisdiction, inasmuch as the Magistrate had not taken

any evidence as was necessary in order to enable him to determine, if possible, who was in possession.

Now, as regards the duties of the Magistrate under section 146, it was laid down in the case of *Mansar Ali v. Matiullah* (1) that the Magistrate in the absence of information might have himself held a local enquiry under section 148 or in various ways might have informed himself as to the facts of the case; as he had not done so it was held that he declined jurisdiction and the order complained of was set aside. This ruling has been followed by this Court in the experience of one of us who has been sitting upon this Bench for the greater part of two years, and has never as far as we know been differed from. There is a ruling in the case of *Bejoy Madhub Chowdhury v. Chandra Nath Chuckerbutty* (2) in which the learned Judges profess to distinguish the ruling in *Mansar Ali v. Matiullah* (1), on the ground that the Judges set aside the order in that case because the Magistrate did not give sufficient time for regular proceedings to be followed. But as we have just pointed out that was only one ground and a minor ground for setting aside the order. The main ground was the ground we have just now cited and that ground appears to us to be an obviously good ground; for the law says that it is only if the Magistrate decides that none of the parties was then in such possession or is unable to satisfy himself as to which of them was in such possession, he can attach the property, and it is perfectly clear that he cannot say he is unable to satisfy himself if he has never made the slightest effort to do so. He had only to send a Kanungoe out to the spot and take his report, or send for the headman of the village and ask him what the facts were; he would have then fully armed himself with

1912

SHEOBALAK  
RAI  
C.  
BHAGWAT  
PANDEY.

(1) (1908) 12 C. W. N. 896.

(2) (1909) 14 C. W. N. 80.

1912  
SHEOBALAK  
RAI  
v.  
BHAGWAT  
PANDEY.

jurisdiction, but he did nothing of the kind, and the case can be clearly distinguished from *Bejoy Madhub Chowdhury v. Chandra Nath Chuckerbutty* (1), where the Magistrate said he was unable to satisfy himself. He does not even say that he has had the slightest difficulty. His order is as follows: "No evidence produced by either side, lands attached under section 146." Whatever view, therefore, be taken of the rulings, that order is clearly incompetent and without jurisdiction.

The order must be set aside and the lands released from attachment.

S. K. B.

*Rule absolute.*

(1) (1909) 14 C. W. N. 80.

## APPELLATE CIVIL.

*Before Mr. Justice Stephen and Mr. Justice Richardson.*

CHANDRA MADHAB BARUA

*v.*

NOBIN CHANDRA BARUA.\*

1912  
June 11.

*Account, suit for—Principal and Agent—Proprietor appointed by the co-proprietors as Common Manager for payment of joint debts, whether an agent of the latter and of the heirs of a deceased proprietor—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 89—Plea of limitation under the Act taken on remand after previous unsuccessful plea of limitation under Act VIII of 1869, s. 30.*

A proprietor appointed by the other co-proprietors of an estate as common manager thereof, for the purpose of realizing its profits and appropriating them to the payment of their joint debt, is an agent of the other

\*Appeal from original decree, No. 326 of 1910, against the decree of F. Emerson, Subordinate Judge of Dhubri, dated May 21, 1910.

proprietors and of the legal representatives of a proprietor since deceased within Art. 89 of the Limitation Act (IX of 1908), and the period of limitation of a suit for accounts brought by the latter against such manager is governed thereby.

Where repeated demands for accounts were alleged in the plaint to have been made, but the dates were not mentioned nor proved, and the demands appeared to have continued to the termination of the agency, it was *held* that limitation commenced to run from the date of the termination of the agency.

A plea of limitation under the Limitation Act may be raised on the hearing after the remand of a case by the High Court notwithstanding the failure of a similar plea taken only under s. 30 of Act VIII of 1869 on the first hearing in the Court below.

THE defendant-appellant Chandra Madhab Barua, and his elder brother, Chandi Charan Barua, were the owners of an 8 as. share in a joint forest estate in the district of Goalpara, the other 8 as. share being the property of their nephew, Nanda Kumar Barua. The estate became heavily involved owing to the expenses of certain litigation, and the appellant was, at the end of 1293 B. S., appointed common manager of the *ijmali* forest by the other co-sharers, on the understanding that the whole profits thereof were to be appropriated to the payment of the joint debt. Chandi Charan died in 1300, and Nanda Kumar in Sraban 1306 (corresponding to July-August 1899). The latter before his death had demanded from the appellant his accounts from 1293 to 1297. A committee was called by the appellant and the matter discussed, but no proper accounts were taken or given. After the death of Nanda Kumar, the plaintiff-respondents, who are his sons and heirs, began to press the appellant for an account of his administration, in consequence of which he withdrew from the management by written notice on 3rd Magh 1308 (16th January 1902). The dates of the several demands were not mentioned in the plaint nor proved, but

1912

CHANDRA  
MADHAB  
BARUA

v.

NOBIN  
CHANDRA  
BARUA.

1912

CHANDRA  
MADHAB  
BARUA  
v.  
NOBIN  
CHANDRA  
BARUA.

they appeared to have continued till the termination of the management.

The appellant thereafter instituted a suit for partition against the present respondents in the Court of the Subordinate Judge of Dhubri, being suit No. 12 of 1902, and one of the issues raised therein was his liability to render accounts before the suit could proceed, and the point was decided in his favour. The present respondents then filed a separate suit for accounts, on the 27th Bhadro 1311 (corresponding to 12th September 1904), numbered 14 of 1904, in the Court of the Subordinate Judge of Zilla Goalpara, who, by his judgment, dated the 26th August 1907, held that it was barred by limitation under s. 30 of Act VIII of 1869, and dismissed the same. The respondents thereupon appealed to the High Court in Regular Appeal No. 459 of 1907, and the learned Judges (Coxe and Richardson JJ.) reversed the order. by their judgment, dated the 14th May 1909, and remanded the case under Order XLI, rule 43 of the Civil Procedure Code, for determination on the issues. The case was heard by the Subordinate Judge of Dhubri who held, on the 21st May 1910, that the appellant was liable to render accounts and rejected the plea of *res judicata*, being of opinion that there was nothing in the judgment of the Subordinate Judge in suit No. 12 of 1902 which amounted to a decision on the question of the general liability of the appellant to furnish accounts. On the question of limitation he found that Art. 89 of the Limitation Act (IX of 1908), which would have applied to a suit between Nanda Kumar and the appellant, did not apply as between the present respondents and the latter, but that the case fell under Art. 120, that Nanda Kumar would have been entitled to sue for accounts up to Sraban 1303, to which right the respondents had succeeded, and that this right was



continued, under s. 8 of the Limitation Act. He accordingly directed the appellant to render accounts from Sraban 1303 to Magh 1308. Chandra Madhab, thereupon, appealed to the High Court.

*Mr. C. R. Das, Babu Provash Chandra Mitter and Babu Susil Madhub Mullick*, for the appellant.

*Babu Manmatha Nath Mukerjee*, for the respondents.

1912

CHANDRA  
MADHAB  
BARUA  
v.  
NOBIN  
CHANDRA  
BARUA.

STEPHEN AND RICHARDSON JJ. This appeal arises out of a suit brought by the plaintiffs for accounts relating to the management of a certain forest mehal from 1293 to 1308. The management was conducted by one Chandra Madhab Barua on behalf of Nanda Kumar Barua, his nephew, who was his co-sharer as to the half of the property. The property got involved in debt, and it was agreed that the best way was for the defendant to take charge of it and to pay off the liability until the property was freed from debt. This state of things continued from the year 1293 to 1306. At a certain time in 1298 the plaintiffs appear to have demanded accounts from Chandra Madhab of his dealings with the property. This demand was refused; at least it was never complied with. Some time after Nanda Kumar died. The business then came to an end in 1308, and this suit was brought on the 12th September 1904, which is a little less than three years after the termination of the business. The Judge of the Court below has held that the suit is not barred by limitation, and this is the principal point which we have to consider in this case. There is a point also as to *res judicata*, but there is no substance in it. This case has already been before this Court on a question as to whether the suit was barred under section 30 of Act VIII of 1869; and the Court held that the limitation provided for by that Act did not apply. It has been

1912

CHANDRA  
MADHAB  
BARUA  
v.  
NOBIN  
CHANDRA  
BARUA.

suggested that the point of limitation ought to have been taken then or not at all. There is no authority for this proposition, and we find that it is still open to the defendant to take the point of limitation.

The first question that arises is under which Article of the Limitation Act the question is to be dealt with. It is suggested on behalf of the defendant that Article 89 is applicable to this case. The plaintiffs contest this view, and say that the relation between the parties in this case is not one of agency. It is difficult to see what else it can be. The defendant was certainly an agent up to the time of the death of Nanda Kumar. After his death we cannot conceive how the defendant remained in possession of the property or how he had any dealings with it except as the agent of the representatives of Nanda Kumar. It is not suggested that he possessed this half of the property in his own right, and if he was not an agent he must have been a trustee, a position which under the circumstances seems impossible. We, therefore, hold that his agency was continued after the death of Nanda Kumar, after which event the present plaintiffs inherited the rights of Nanda Kumar and became, therefore, his principals. We, therefore, hold that Article 89 applies to this case.

The next question is how that Article will apply, and the question arises whether any demand has been made, because if it has not, the commencement of the limitation will be the termination of the agency. As we have said, there is evidence, which we cannot overlook, that a demand was made by Nanda Kumar which met with no attention. Limitation, therefore, will run from the date of the demand by Nanda Kumar so far as the obligations of the defendant were incurred during his life-time. Since his death we learn from the plaint that repeated demands have been made by the plaintiffs.

The dates of these repeated demands are not given and not proved. But from the language of the pleading we must suppose that the demands were going on as long as the business was in existence, and, therefore, limitation will run from the termination of the agency business which, as we have said, was a little less than three years before suit. The defendant admits that he is liable to accounts from Bhadra to Magh 1308, and, therefore, accounts for this period must be rendered. As to the rest of the case we hold that the suit is barred. This appeal is, therefore, allowed and the decree of the lower Court is modified in accordance with what we have said. The parties are entitled to proportionate costs.

E. H. M.

*Decree modified.*

1912  
CHANDRA  
MADHAB  
BARUA  
v.  
NOBIN  
CHANDRA  
BARUA.

## APPELLATE CIVIL.

*Before Mr. Justice Carncluff and Mr. Justice Chapman.*

MAJIBAR RAHMAN

v.

MUKTASHED HOSSEIN.\*

1912

June 11.

*Agreement against public policy—Contract Act (IX of 1872), s. 23—  
Compromise forbidden by law—An agreement to compound a non-compoundable offence, void—Criminal breach of trust—Mortgage—Illegal consideration.*

It is contrary to public policy to compound a non-compoundable criminal case, and any agreement to that end is wholly void in law :

*Held*, therefore, that a mortgage bond executed by a *gomastha* in favour of his master for withdrawal of a prosecution for criminal breach of trust,

\*APPEAL from Appellate Decree, No. 2306 of 1909, against the decree of F. Roe, District Judge of 24-Parganas, dated June 1st, 1909, confirming the decree of Basanta Kumar Pal, Munsif of Basirhat, dated Dec. 23, 1908.

1912  
 MAJIBAR  
 RAHMAN  
 v.  
 MUKTA-  
 SHED  
 HOSSEIN.

which is not compoundable under the Criminal Procedure Code, is void (though a settlement out of Court had been suggested by the Magistrate); and a suit by the master to enforce such a bond is not maintainable.

*Nubbee Buksh v. Hingon* (1) commented on.

SECOND APPEAL by the defendant, Sheikh Majebar Rahman.

This appeal arose out of an action brought by the plaintiff to enforce a mortgage-bond executed by the defendant. It appeared that the defendant, who was the *tehsildar* of the plaintiff, was suspected of embezzling a large sum of money, and was arrested by order of the Subdivisional Magistrate of Basirhat. The case was transferred to the Court of the Subdivisional Magistrate of Barasat, who suggested that the case was appropriately one which might be settled out of Court. Accordingly the matter was settled, the defendant executed the aforesaid mortgage-bond in favour of the plaintiff, and in consequence thereof the criminal prosecution was dropped.

Defendant pleaded, *inter alia*, that, the agreement being contrary to public policy, the mortgage-bond was void, and therefore the suit ought to be dismissed.

The Court of first instance overruled the objection and decreed the plaintiff's suit. On appeal, the learned District Judge of 24-Parganas affirmed the decision of the first Court.

Against this decision the defendant appealed to the High Court.

*Babu Dwarka Nath Mitter* (*Babu Satindra Nath Mukherji* with him), for the appellant. The mortgage-bond, upon which the suit was based, was executed by the appellant to compromise a non-compoundable criminal case brought against him for embezzlement of

money. The transaction was against public policy: see section 345, Criminal Procedure Code; see also section 23, illus. (h) of the Contract Act. The contract is illegal; respondent could not take advantage of such a contract. The case of *Nubbee Buksh v. Hingon* (1) was decided before the passing of the Indian Contract Act; therefore that case does not help the other side. It makes no difference even if the compromise be effected at the suggestion of the Criminal Court: see *Flower v. Sadler* (2) and *Williams v. Bayley* (3).

*Moulvi Wahid Hossein*, for the respondent. This is a case of criminal breach of trust; it is of a *quasi* civil nature. The defence of the appellant in the case was that the Criminal Court had no jurisdiction, as it involved a question of accounts between the parties. The accused asked the Court to refer the case to a Civil Court for an account being taken, and the Magistrate, having had reason to believe that the case might not be within his competency to try as it virtually involved civil rights of the parties, suggested a settlement out of Court. No doubt a charge was drawn up, but further trial of the accused in his opinion was useless. Neither the respondent nor the Court suggested that the proceeding would be dropped on compromise. An arbitration was arranged, and according to the award of the arbitrators the mortgage-bond was executed by the appellant. The finding of both the lower Courts is that there was nothing unfair in the arbitration, and that no undue advantage was taken of the criminal case. Here the respondent did not make a bargain out of the case; he got less than what was actually due to him; hence the contract was not against public policy: see *Flower v. Sadler* (2) and *Keir v. Leeman* (4).

1912  
MAJIBAR  
RAHMAN  
v.  
MUKTA-  
SHED  
HOSSEIN.

(1) (1867) 8 W. R. 412.

(3) (1866) L. R. 1 H. L. 200, 220.

(2) (1882) 10 Q. B. D. 572.

(4) (1846) 9 Q. B. 371.

1912  
 MAJIBAR  
 RAHMAN  
 v.  
 MUKTA-  
 SHED  
 HOSSEIN.

The English cases on the point clearly show that, when there are two remedies, civil and criminal, open to a party, he is at liberty to pursue both or either of them. Pendency of a criminal case is no bar to obtaining a civil remedy. In this case the respondent pursued both the remedies; the criminal matter was kept in the hands of the Criminal Court; and the mortgage-bond was obtained to ensure his civil rights. His civil rights did not depend upon the criminal prosecution, nor was the prosecution stifled to make a bargain out of it. There is no finding to that effect; on the other hand, the finding is there was no avoidance of public duty. I rely on the cases of *Ancketill v. Baylis* (1) and *Windhill Local Board of Health v. Vint* (2).

It would be a broad proposition to hold that, if a criminal case be non-compoundable, it is against public policy to withdraw from it, or to enforce a civil right during its pendency.

CARNDUFF J. The appellant before us was the *gomastha* of the respondent. He was prosecuted by the respondent for criminal breach of trust under section 408 of the Indian Penal Code in respect of certain moneys collected in the course of his duty. The Magistrate before whom the case was being tried, suggested, after having drawn up a charge, that the matter was one which might appropriately be settled out of Court. Accordingly the matter was settled out of Court. The appellant executed a mortgage-bond for the amount embezzled, and, though the withdrawal of the criminal prosecution is not mentioned in the instrument as forming part of the consideration, the prosecution was in fact dropped by the respondent after the execution of the deed, and the appellant was

(1) (1882) 10 Q. B. D. 577, 579.

(2) (1890) 45 Ch. D. 351.

then acquitted or discharged. The suit out of which this appeal arises, was afterwards brought upon the mortgage-bond executed in the circumstances just described, and it has been decreed by both the Courts below. The defendant has now preferred this second appeal to the High Court.

1912  
MAJIBAR  
RAHMAN  
v.  
MUKTA-  
SHED  
HOSSEIN.

In my opinion, the appeal clearly must be allowed. The lower Appellate Court has held that no general rule as to what is, or what is not, contrary to public policy can be, or has been, laid down, and, relying on *Nubbee Buksh v. Hingon* (1), has declared that its conscience felt no repugnance towards the agreement between the respondent and the appellant, and that it entirely failed to see any danger to the public good therein. Now, the case cited by the learned District Judge stands, as far as I know, absolutely alone, and it appears to me to run counter to the trend of all authority. It is a case, moreover, of 1867, that is to say, of a time when the law on the subject had not been codified by the Indian Contract Act of 1872, and when the Code of Criminal Procedure in force contained no provision, such as that to be found in section 345 of the present Code, for the compounding of offences. The law, therefore, as to when there might be a compromise in a criminal case was not settled, and the law as to agreements contrary to public policy was probably equally unsettled. But now we have for our guidance section 345 of the Code of Criminal Procedure of 1898 and section 23 of the Indian Contract Act of 1872 with its Ill. (h), and there can, so far as I can see, be no doubt as to what the legal position is.

CARNDUFF J.

The broad principle is laid down by Lord Westbury in *Williams v. Bayley* (2), a decision to which the learned District Judge has himself referred, although he seems to have failed to appreciate its effect. If a

(1) (1867) 8 W. R. 412.

(2) (1866) L. R. 1 H. L. 200, 220.

1912  
 MAJIBAR  
 RAHMAN  
 v.  
 MUKTA-  
 SHED  
 HOSSEIN.  
 CARNDUFF J.

criminal case is declared to be non-compoundable, then it is against public policy to compound it, and any agreement to that end is wholly void in law. Criminal breach of trust is (*see* section 345 of the present Code of Criminal Procedure) non-compoundable either with or without the sanction of the Court. *Keir v. Leeman and Pearson* (1), which was affirmed by the Exchequer Chamber in *Keir v. Leeman* (2) and followed by the Court of Appeal in *Windhill Local Board of Health v. Vint* (3), is ample authority for holding the view that the circumstance that the Magistrate wrongfully suggested or sanctioned the compromise makes no difference whatever. And the principle, established by *Collins v. Blantern* (4), that illegality may be pleaded as a defence to an action on a bond, has been so often recognised and is so well settled that it would be useless to enter into any discussion regarding it.

This appeal therefore must be allowed, the decree of the Court below discharged, and the respondent's suit dismissed with costs throughout.

CHAPMAN J. I agree, but desire to carefully confine my reason for holding that the bond was void to the ground that the consideration for the bond was found by the lower Court to be a promise to withdraw from the prosecution in a case the compromise of which is expressly forbidden by the Code of Criminal Procedure.

S. C. G.

*Appeal allowed.*

(1) (1844) 13 L. J. Q. B. 359.

(3) (1890) 45 Ch. D. 351.

(2) (1846) 9 Q. B. 371.

(4) (1765) 1 Smith. L. Cas., 11th Ed., 369.



**ORIGINAL CIVIL.**

*Before Mr. Justice Fletcher.*

**KESRI CHAND***v.***NATIONAL JUTE MILLS Co.\*****1912***June 17.*

*Practice—Evidence—Defendant's right to offer evidence.*

Where the defendant appears and the plaintiff does not appear or offers no evidence when a suit is called on for hearing, the Court has no jurisdiction except to dismiss the suit for want of prosecution: the defendant is not entitled to have his evidence heard before the suit is dismissed.

*Ex parte Jacobson* (1) distinguished.

**ORIGINAL SUIT.**

This action was brought by the plaintiff against the National Jute Mills Co., Ltd., and Messrs. Andrew Yule & Co., who were the managing agents both of the National Jute Mills Co. and of the New Zealand Insurance Co., a foreign company having no registered office in British India.

It was alleged by the plaintiff that he was induced by the representations of one Mr. J. H. Manning-Fox, who was then the head of the insurance department of Messrs. Andrew Yule & Co., to enter into transactions of the following nature: the plaintiff was to purchase from time to time quantities of salvaged jute from the insurance agencies of Messrs. Andrew Yule & Co., and to sell the same at a higher rate through the mills department of Messrs. Andrew

\* Ordinary Original Civil Suit No. 697 of 1911.

(1) (1882) L. R. 22 Ch. D. 312.

1912  
KESRI  
CHAND  
v.  
NATIONAL  
JUTE MILLS  
Co.

Yule & Co., Mr. Manning-Fox undertaking to give delivery direct to the purchasing mills. From June 1909 to March 1911 the plaintiff entered into numerous transactions of this nature, obtaining receipts for payments made in respect of their purchases, receipts for jute delivered in respect of their sales, and full payment for the jute so sold and delivered. In March 1911 the plaintiff purchased three lots of jute for the sum of Rs. 2,42,000 from Messrs. Andrew Yule & Co., as agents of the New Zealand Insurance Co., and paid for the same in full, and was granted receipts signed by J. H. Manning-Fox for Messrs. Andrew Yule & Co. as managing agents of the New Zealand Insurance Co. These three lots of jute were sold to the National Jute Mills Co., Ltd., for the sum of Rs. 2,69,750, and the plaintiff obtained receipts for the delivery of the jute purporting to be signed by the mill-manager of the National Jute Mills Co. The plaintiff applied for payment to Messrs. Andrew Yule & Co. as agents of the National Jute Mills Co.: thereupon Messrs. Andrew Yule & Co. repudiated the transactions, and stated that neither the New Zealand Insurance Co. nor the National Jute Mills Co., Ltd., had ever entered into the transactions suggested by the plaintiff, and subsequently after inspection of the receipts they denounced them as false and fabricated.

Thereupon the plaintiff brought this action, claiming the sum of Rs. 2,69,750 from the National Jute Mills Co., Ltd., and Messrs. Andrew Yule & Co., and in the alternative the sum of Rs. 2,42,000 or jute of equivalent value from Messrs. Andrew Yule & Co.

It was contended by the plaintiff that Messrs. Andrew Yule & Co. were bound by the acts and representations of Mr. Manning-Fox and their manager of the mills department.

The National Jute Mills Co. and Messrs. Andrew Yule & Co. filed separate written statements. Shortly their defence was that no such jute had ever been sold by the New Zealand Insurance Co. to the plaintiff, nor purchased by the National Jute Mills Co., Ltd., from the plaintiff, and that the plaintiff deliberately entered into a fraudulent conspiracy with Mr. Manning-Fox for the purpose of cheating and defrauding the defendants and the New Zealand Insurance Co.

When the suit came on for hearing, the plaintiff was not represented by counsel, and, in reply to an enquiry made by the Court, the plaintiff's attorney stated that he had not instructed counsel.

*Mr. Jackson* (with him *Mr. W. Gregory* and *Mr. Langford James*), for Messrs. Andrew Yule & Co. I am anxious to call my evidence. The suit being dismissed for default, may lead to insinuations and suggestions, or there may be an application for its restoration. Issues have been framed on a previous occasion. The defendant is entitled to have evidence given, even though the Court is prepared to decide in his favour: *Ex parte Jacobson* (1). The Civil Procedure Code does not differ from the English Judicature Acts which do not prevent such evidence being given.

*Mr. Norton* (with him *Mr. Pugh* and *Mr. Pearson*), for the National Jute Mills Co. Ltd., made a similar application.

1912  
KESRI  
CHAND  
v.  
NATIONAL  
JUTE MILLS  
Co.

1912  
---  
KESRI  
CHAND  
v.  
NATIONAL  
JUTE MILLS  
Co.  
---  
FLETCHER J.

The decision of Sir George Jessel in *Ex parte Jacobson* (1) does not apply to this case at all. That case was that when the Master had heard the evidence given on behalf of the plaintiff, he said he was prepared to decide on the defendant's side without calling for any evidence to be given for or on behalf of the defendants. That of course is a position which the defendant is not bound to take up. Under our Code, notwithstanding that at the close of the plaintiff's case the Judge has formed an opinion in favour of the defendant, the defendant can say that he is entitled to give evidence in proof of the case he has made in his own written statement; so that in the case of an appeal there may be no remand, but the whole case may be disposed of. This is not a case where the plaintiff offers evidence. When the plaintiff offers no evidence, the Court has no jurisdiction except to dismiss the suit for want of prosecution. This case must be dealt with on that footing. The plaintiff must pay to the defendant the costs of this suit and of the commission to England, on scale No. 2.

Attorneys for the plaintiff: *Fox & Mandal.*

Attorneys for the defendants: *Leslie & Hinds.*

J. C.

(1) (1882) L. R. 22 Ch. D. 312, 314.

**APPELLATE CIVIL.**

*Before Justice Sir Cecil Brett and Mr. Justice Sharfuddin.*

SECRETARY OF STATE FOR INDIA

1912

*v.*

June 25.

PURNENDU NARAYAN ROY.\*

*Ultra vires—Bengal Tenancy Act (VII of 1885), s. 101, cls. 2 (a) and 3 —“A large proportion of landlords,” meaning of—Order passed by Local Government under section 101, cl. 2 (a), at the instance of landlords having large proportion of interest, effect of—Jurisdiction of Civil Court to question validity of the order, after issue of Notification under the section.*

The words “a large proportion of the landlords” in section 101, cl. 2 (a) of the Bengal Tenancy Act, mean a large proportion of the landlords as determined by the interests they hold in the estate.

Where, therefore, an application was made by landlords having a large proportion of interest in an estate, to the Local Government for the issue of an order under the said section, and an order was accordingly issued by a Notification in the official Gazette.

*Held*, that the order was not *ultra vires*.

*Held*, further, that it was with the Local Government the discretion rested to determine whether the application was in due form under the provisions of section 101, cl. 2 (a) of the Act, and after the Local Government had decided that point and had issued the Notification, the jurisdiction of the Civil Court to interfere with the order was barred by clause 3 of the same section.

APPEAL by the defendant, Secretary of State for India in Council.

The plaintiffs, Purnendu Narayan Roy and others, are the owners of estate bearing tauzi No. 254 of Murshidabad Collectorate, and the Nawab Bahadur of Murshidabad is the owner of tauzi No. 253. Many

\* Appeal from Original Decree, No. 293 of 1909, against the decree of Narendra Krishna Dutt, Subordinate Judge of Berhampur, dated May 12 1909.

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.PUERNENDU  
NARAYAN  
ROY.

years ago, they were partitioned from the parent estate, pergunnah Fateh Singh, and by that partition separate and entire mouzas were allotted to each estate, and some mouzas remained joint in the two tauzis. The Nawab Bahadur of Murshidabad made an application for a survey and record-of-rights in respect of tauzi No. 253, and necessary orders were passed by the Local Government under section 101 of the Bengal Tenancy Act. While the settlement of tauzi No. 253 was going on, a notice, dated the 26th September, 1904, was served upon the plaintiffs for the survey and record-of-rights of tauzi No. 254. The plaintiffs objected to this, but their objection having been overruled, a survey and record-of-rights were made of the mouzas which were joint. On the 17th of February, 1908, a notice was issued to the plaintiffs by the Collector of Murshidabad calling upon them to contribute Rs. 26,053 towards the expenses of the record-of-rights. The plaintiffs objected, but their objection was disallowed by the Collector on the 23rd of April, 1908. Hence the suit was brought by the plaintiffs for a declaration that they were not liable for the cost of the settlement proceedings, alleging that it was not done at their instance. They also alleged that the order for survey and record-of-rights with respect to tauzi No. 254 was *ultra vires* and illegal, and that the Collector of Murshidabad had no authority to enforce payment of any portion of the costs.

Defendant pleaded, *inter alia*, that the order directing the preparation of the record-of-rights of the ijmalî mouzas was neither illegal nor *ultra vires*, and that the Civil Court had no jurisdiction to entertain the suit and to question the legality of the order for contribution made by the Collector.

It appeared that the application under section 101 of the Bengal Tenancy Act was made by three

landlords having a half interest in the estate, the other half interest being held by five landlords.

The Subordinate Judge overruled the objections of the defendants and decreed the suit. Against this decision the defendants appealed to the High Court.

1912  
SECRETARY  
OF STATE  
FOR INDIA  
v.  
PURNENDU  
NARAYAN  
ROY.

*Mr. S. P. Sinha (Mr. Mirza, Babu Ram Charan Mitter, Babu Srish Chunder Chowdhury, Babu Hemendra Nath Sen and Babu Naresh Chandra Sinha with him),* for the appellants. The Court below was wrong in holding that the order under section 101 of the Bengal Tenancy Act directing a preparation of the record-of-rights was itself *ultra vires*. It held that inasmuch as the order was *ultra vires*, the apportionment of costs by the Collector under s. 114 of the Act was illegal; therein it was clearly wrong. It was wrong in holding that the application having been made by three out of the eight landlords, though their interest in the estate was equal to that of the other five, was not one made by a "large proportion of landlords" within the meaning of section 101, cl. 2(a) of the Act, and therefore the order and notification issued under the section was *ultra vires*. The words "a large proportion of the landlords" in that section mean landlords having a large interest in the estate. It is also borne out by the subsequent amendment of the Act in 1907. Section 101 cl. 3 of the Act says that a notification in the official Gazette of an order under this section shall be conclusive evidence of an order duly made. No suit lies in the Civil Court to question the validity of such an order. By way of analogy section 6 of the Land Acquisition Act and section 8 of the Public Demands Recovery Act, may be referred to.

*Dr. Rashbehary Ghose (Babu Saroda Prasanna Roy and Babu Ram Chandra Mozumdar with him),*

1912  
 SECRETARY  
 OF STATE  
 FOR INDIA  
 v.  
 PURNENDU  
 NARAYAN  
 ROY.

for the respondents. The Civil Court had power to question the legality of the order passed by the Local Government under section 101, cl. 2(a) in spite of the fact that the order had been duly notified in the official Gazette : see *Damodar Gordhan v. Deoram Kanji* (1), and section 113, of the Evidence Act. Change of language by the Legislature in an Act must be attributed to the fact that the Legislature intended to change the law. The amending Act of 1907 changed the language of section 101; the expression "a large proportion of landlords" means a large proportion in number. Notification which was issued at the instance solely of the Nawab of Murshidabad, was a notification which the Local Government had no authority to issue under section 101, and was therefore *ultra vires*. If the notification was *ultra vires*, the mere fact that it would be conclusive evidence that the order had been duly made, would not prevent the Civil Court from holding that it was *ultra vires*.

*Cur. adv. vult.*

BRETT AND SHARFUDDIN JJ. The suit out of which the present appeal arises was brought by the plaintiff respondents, who are the proprietors of estate No. 254 on the roll of the Collector of Murshidabad, against the defendant appellant, the Secretary of State for India in Council, to have it declared that an order of the Government of Bengal dated the 25th November 1908 passed under section 114 of the Bengal Tenancy Act, apportioning the cost of the survey and preparation of records-of-rights of estates Fateh Singh in the district of Murshidabad and directing the recovery of their share from the



plaintiffs should be declared to be invalid, and that the certificate subsequently issued under the provisions of the Public Demands Recovery Act against them for the recovery of the sum should also be declared to be bad in law and invalid, and that, therefore, it should be declared that the plaintiffs were not liable to pay any amount of the costs of the survey and settlement proceedings referred to in the order. The amount which the plaintiffs were called upon to pay was first fixed at Rs. 26,053 but this was afterwards reduced to Rs. 23,582-9, and the certificate was issued for the latter amount. The ground on which it was alleged that the order under section 114 of the Bengal Tenancy Act was illegal was that the original notification dated the 20th February 1905, issued under the provisions of section 101, clause 2 (a) of the Bengal Tenancy Act on the 20th February 1905, was illegal and that therefore the subsequent order under section 114 of the Bengal Tenancy Act providing for an apportionment of the costs of the settlement was also illegal.

It appears that the original estate, Fatch Singh, belonged to the Raja of Baidanga and the Raja of Jamooe in equal shares. The estate was divided in 1786 into two estates Nos. 253 and 254 of the Collectorate roll of the district of Murshidabad and estate 253 was allotted to the Raja of Baidanga and estate 254 to the Raja of Jamooe. The zemindary right of the Raja of Baidanga in estate No. 253 was sold by auction on the 15th September 1898, and was purchased by the Nawab of Murshidabad (13 annas), and his two brothers ( $1\frac{1}{2}$  annas each or a total of 3 annas). The two brothers afterwards executed in favour of the Nawab a patni lease of their 3 annas share.

It appears that in estate No. 253 there are certain mouzas belonging exclusively to that estate and other

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
PURNENDU  
NARAYAN  
ROY.

1912

SECRETARY  
OF STATE  
FOR INDIA

v.

PUERNENDU  
NARAYAN  
ROY.

mouzas held jointly with the owners of estate No. 254 and the same is the case with estate No. 254.

In 1902 the Nawab of Murshidabad applied to Government for a survey and settlement of the mouzas lying in estate No. 253, and the application was granted and a notification published under section 3 of the Bengal Survey Act V (B.C.) of 1875 on the 25th November 1902.

In 1903 the Nawab applied for the preparation of a record-of-rights in the same villages under the provisions of the Bengal Tenancy Act, and on the 3rd December 1903 the application was granted and a notification published under section 101 clause 2 (a) of the Bengal Tenancy Act.

With these notifications we have no concern in the present appeal.

An application was then made by the Nawab of Murshidabad in 1905 in which, after pointing out that the survey and settlement proceedings ordered by Government would cover not only the mouzas held by him exclusively as proprietor of estate No. 253 but also some 85 mouzas which as such proprietor he held jointly with the proprietors of estate No. 254, and that the proceedings would virtually cover the lands of all these mouzas held by the proprietors of both estates jointly, and after further pointing out that the proprietors of estate No. 254 would benefit in respect of those mouzas as much as he would, he prayed for the issue of a further notification covering not only the half share of the Nawab in those mouzas but also the share of the proprietors of estate No. 254 so as to make the proceedings valid and complete. Notice of this application was given to proprietors of estate No. 254, who put in a petition of objection. The objections were overruled, and on the 20th February 1905 a notification was issued under section 101 clause 2 (a)

covering the lands included in the half share of those mouzas which belonged to the proprietors of estate No. 254.

This is the notification which in their suit the plaintiffs attacked as being invalid and contrary to law.

The survey and settlement proceedings and the preparation of the record-of-rights were duly carried through, the plaintiffs being properly represented throughout the proceedings, and having disputes between them and their tenants settled under the provisions of section 106 and other sections of the Bengal Tenancy Act. After the completion of the proceedings and the final publication of the record-of-rights a notice was issued by the Settlement Officer to the plaintiffs on the 17th February, 1908 calling on them to deposit the sum of Rs. 26,053 as their share of the cost of the proceedings. On the 23rd March 1908 the plaintiffs put in a petition of objection but the objections were overruled and the order for apportionment was made by the Local Government on the 5th June 1908 and duly published in the Gazette on the 25th November 1908. The sum to be recovered from the plaintiffs was afterwards reduced, on a careful calculation being made, to Rs. 23,582-9, and a certificate was issued against them under the Public Demands Recovery Act for the recovery of that sum.

The present suit was instituted on the 3rd August 1908, after the order of apportionment had been made on the 5th June 1908.

The two main points taken on behalf of the plaintiffs were first that the notification issued by the Government of Bengal dated 20th February 1905 under section 101, clause 2(a) of the Bengal Tenancy Act (as that Act stood before the last amendment by Bengal Act I of 1907) was illegal because the application

1912

SECRETARY  
OF STATE  
FOR INDIA  
o.  
PUERNENDU  
NARAYAN  
ROY.

1912  
SECRETARY  
OF STATE  
FOR INDIA  
v.  
PUENENDU  
NARAYAN  
ROY.

for the order under that section was not made by "a large proportion of the landlords," as required by the section. It was admitted that the Nawab and the plaintiffs each had an equal half share in the villages in which the record-of-rights was to be made, but it was contended that because the Nawab was only one and the plaintiffs were five in number, therefore, the application being made by the Nawab could not be said to have been made by a large proportion of the landlords. It is to be noticed that the Nawab died in 1904 and that the successors to his interests were three in number at the time the notification was issued.

For the plaintiffs it was argued that "the large proportion of landlords" as contained in section 101 clause 2(a) was not confined to the proportion numerically but that it referred to the interests which the landlords had in the estate and that this was made clear when the Bengal Tenancy Act was amended by Bengal Act I of 1907. Further, it was argued that section 101 clause 3 of the Bengal Tenancy Act expressly deprived the Civil Court of any jurisdiction to entertain this question when once the notification in the official Gazette had been published. Further, it was contended, that the Civil Court had no jurisdiction to interfere with the apportionment of costs made by the Local Government under section 114 of the Bengal Tenancy Act as that was a matter placed by the law absolutely in the discretion of the Government.

The second main point taken in support of the suit was that the plaintiffs could not be held liable to pay any amount for the costs of the proceedings for the preparation of the record-of-rights as the Assistant Settlement Officer had given an undertaking absolving them from all such liability in the notice which he issued to them on the 25th September 1904.

On behalf of the defendant it was argued, that not only had the Assistant Settlement Officer no power under the law to absolve the plaintiffs from liability to pay their share of the expenses of preparing the record-of-rights, but that in fact his notice had no such meaning or intention. The notice was issued in consequence of an application made by the Nawab to have the whole of the joint villages brought under the settlement and record-of-rights because (*inter alia*) he was bearing all the costs while the proprietors of the other half share in all the villages would reap part of the benefits. From their petition of objection it was clear that the plaintiffs were aware of this and it was argued that the suggestion made in their behalf was not entitled to consideration.

The Subordinate Judge found in favour of the plaintiffs on both these points and granted a decree in their favour by which he declared "that the plaintiffs were not liable to pay any cost of the survey and record-of-rights of Tauzi No. 254 claimed by the defendant, and that the defendant be permanently restrained from realising the amount of the certificate on account of such cost."

The defendant has appealed to this Court.

Before us the two points which have been pressed for the appellant are, *first*, that the lower Court erred in holding (a) that the order and notification issued by the Government of Bengal under section 101 clause 2(a) on the 20th February 1905 and 22nd February 1905 respectively were *ultra vires* and therefore invalid, and (b) that in consequence the order of apportionment passed by the Government of Bengal under section 114 of the Bengal Tenancy Act on the 5th June 1908, which was published in the *Calcutta Gazette* on the 25th November 1908, was also invalid and not binding on the plaintiffs. It was contended

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
PUERNENDU  
NARAYAN  
ROY.

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
PUERNENDU  
NARAYAN  
ROY.

that the jurisdiction of the Civil Court to question the legality and effect of the order and notification issued under section 101 of the Bengal Tenancy Act was expressly barred by the provisions of clause 3 of section 101 of the Act. Further, it was contended, that the Civil Court had no jurisdiction to question or interfere with the order passed by the Local Government under section 114 of the Bengal Tenancy Act as by that section exclusive power and discretion was given to the Local Government.

The *second* point taken has been that the lower Court erred in holding that the notice issued by the Settlement Officer to the plaintiffs on the 25th September 1904 contained any undertaking on the part of that officer that the plaintiffs would be exempted from all liability for any of the costs of the proceedings for the settlement and the record-of-rights.

The learned pleader for the respondents has not assailed the soundness of the contention advanced on behalf of the appellant that ordinarily the Civil Court has not jurisdiction to question or interfere with an order passed by the Local Government under section 114 of the Bengal Tenancy Act; but he has argued that if the order and notification issued under section 101 clause 2(a) be held to be *ultra vires* and invalid then on that account the order under section 114 of the Tenancy Act, arising out of the proceeding taken under that notification, cannot hold good but must also be held to be invalid and of no effect against the plaintiffs.

A considerable portion of the judgment of the lower Court has been devoted to the discussion of various cases which appear to have been relied on by the plaintiff to support the contention that the Civil Court had power to set aside the order passed by the Local Government under section 101 clause 2(a) of the

Bengal Tenancy Act. These for the most part relate to the provisions of other Acts and it appears to have been argued that by analogy they could be applied to the facts of the present case. The learned pleader for the respondents as well as the learned counsel for the appellant have not thought it necessary to enter into any discussion of these cases before us, and we think that they have very wisely refrained from doing so. In our opinion, those cases can have no application to the present case which must be decided on the provisions of the law and on the facts before us.

A contention was advanced by the learned counsel for the appellants that the provisions of section 111A of the Bengal Tenancy Act debarred the Civil Court from jurisdiction to determine that the order issued by the Local Government under section 101 clause 2(a) of the Bengal Tenancy Act was *ultra vires* and illegal. The point was not very strongly pressed and in our opinion cannot be maintained. Section 111 provides that "No suit shall be brought in any Civil Court in respect of any order directing the preparation of a record-of-rights under this chapter or etc.". What, however, is attacked in this case is not the order itself but the conditions under which it was issued. This, it is argued, did not fulfil the requirements of section 101 clause 2(a) of the Act and therefore the order was illegal and *ultra vires*, and that does not appear to be a point covered by section 111A of the Act.

The most important question which we have now to consider is (i) whether the order passed by the Local Government under section 101 clause 2(a) of the Bengal Tenancy Act was *ultra vires* and therefore invalid; and (ii) whether the Civil Court had power after the issue of the notification to question the validity of the order.

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
PUERNENDU  
NARAYAN  
ROY.

1912

SECRETARY  
OF STATE  
FOR INDIA  
r.PUENENDU  
NARAYAN  
ROY.

The lower Court has held that the order was *ultra vires* because the application was not made to the Local Government by "a large proportion of the landlords." In fact it appears to have been made by three landlords holding a half interest in the estate, the other half interests being held by five landlords. The learned Judge has held that the word "proportion" in the section must be interpreted to mean "numerical proportion" only, and cannot mean proportion of the interest held in the estate by the landlords, and he considers that he is supported in that conclusion by the amendment which was made in the Act by Bengal Act I of 1907. In support of this view the learned pleader for the respondents has argued that any amendment made in the language of any legal enactment must be taken to import a change in the law.

We do not think that in the present case these arguments can be accepted as sound nor do we think that a change in the language of a statute can only be taken to indicate a change in the law. In the old section the expression "a large proportion of the landlords" appears to have been considered to be ambiguous. Certainly it appears to us to be capable of meaning "the landlords, holding a large proportion of the interests in the estate." This indeed appears to have been accepted by the learned Judge of the lower Court as what must be taken to have been the intention of the Legislature, for in dealing with the question, he points out that if the other view be approved it follows that the words used in the section would lead to an absurdity. But because he is of opinion that the words used are capable of one meaning only, he considers that he has no option but to enforce them even though the meaning be absurd and mischievous.



We are unable to agree with the Subordinate Judge that the words "a large proportion of the landlords" are capable of meaning only "a large numerical proportion of the individuals constituting the body of landlords and not a large proportion of them as regarded from the interest, held by them in the estate." Also we are unable to accept the contention of the learned pleader for the respondent that a change in the wording of a section of an enactment necessarily involves a change in the law. Amendments are often made to clear up ambiguities and such amendments which are intended to prevent misinterpretation do not in themselves alter the law in any way.

Section 101 of the Bengal Tenancy Act has clearly been framed to empower the Local Government to take certain action on certain conditions, and primarily the interpretation of those conditions would rest with the Local Government and the amendment made by Act I of 1907 had for its object to clear away any difficulty which might be felt in applying the section. It has not been suggested to us that it has ever been held either by the Local Government or any other authority that the words "a large proportion of landlords" could only mean "a large numerical proportion." In the present instance, the Local Government clearly interpreted them to mean "a large proportion of the landlords as determined by the interests they held in the estate." That appears to us to be an eminently reasonable interpretation of the meaning of the words, and neither the reasons given by the learned Judge in his judgment nor the argument advanced by the learned pleader for the respondents have satisfied us that we are bound to adopt a meaning which would lead us in an absurdity.

We hold, therefore, that the application in this instance was made to the Local Government by a

1912

SECRETARY  
OF STATE  
FOR INDIA

r.

PURNENDU  
NARAYAN  
ROY.

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.PURNENDU  
NARAYAN  
ROY.

large proportion of the landlords of the estate, and that the order passed under section 101 clause 2 (a) was not *ultra vires*.

The second question raised is whether the first Court had power after the issue of the notification to question the validity of the order, having regard to the provisions of section 101, clause 3 of the Tenancy Act. After the conclusion we have arrived at on the first point its decision is not of serious importance.

For the respondent it has been argued that the Civil Court had power to question the legality of the order passed by the Local Government under section 101, clause 2 (a) in spite of the fact that the order had been duly notified in the official Gazette and in support of this contention reliance is placed on the decision of their Lordships of the Privy Council in the case of *Damodar Gordhan v. Deoram Kanji* (1). That case cannot however be taken to be on all fours with the present case or to afford us any real assistance in deciding the question before us. One of the points raised in that case was whether the Governor-General in Council could, by a Legislative Act purporting to make a notification in the Government Gazette conclusive evidence of a cession of territory, exclude enquiry as to the nature and lawfulness of that cession, the Governor-General in Council being expressly precluded by Act 24 and 25 Vic. c. 67 s. 22 from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India or as to the allegiance of British subjects; and their Lordships held that this could not be done. In that case the authority was expressly precluded, and it was held that authority could not be given and an inquiry as to its propriety excluded by a legislative enactment which purported

to make a notification in the official Gazette conclusive proof of its legality. In the case before us the authority is expressly given by the section to Government to pass the order, and the section then goes on to provide that after the order has been notified in the Gazette that notification shall be conclusive evidence that the order has been duly made.

In the present case the provisions of section 101 clause 2 (a) of the Bengal Tenancy Act appear to have been complied with before the order was passed. Notice was served on the respondents and their objection was heard. The order was then passed and subsequently notified in the official Gazette. We hold that the discretion rested with the Local Government to determine whether the application was in due form under the provisions of section 101 clause 2 (a) and after the Local Government had decided that point and had issued the notification the jurisdiction of any Civil Court to interfere with the order was barred by clause 3 of the same section.

We may notice that the objection taken before us does not appear to have been raised before the Collector; that after the notification had issued the respondents appeared and attended at the proceedings before the Revenue Officer for the settlement and record-of-rights, and in fact fought out disputes in those proceedings with the tenants under section 106 and other sections of the Act. It was only when the proceedings were completed and the respondents were called on to pay their share of the costs that they instituted the suit and raised the question as to legality of the order of Government passed under section 101 clause 2 (a) of the Tenancy Act. In these circumstances, even if we had not found against them on other reason, we consider that they would not be entitled to succeed in the present suit.

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
PUERNENDU  
NARAYAN  
ROY.

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.PUERNENDU  
NARAYAN  
ROY.

large proportion of the landlords of the estate, and that the order passed under section 101 clause 2 (a) was not *ultra vires*.

The second question raised is whether the first Court had power after the issue of the notification to question the validity of the order, having regard to the provisions of section 101, clause 3 of the Tenancy Act. After the conclusion we have arrived at on the first point its decision is not of serious importance.

For the respondent it has been argued that the Civil Court had power to question the legality of the order passed by the Local Government under section 101, clause 2 (a) in spite of the fact that the order had been duly notified in the official Gazette and in support of this contention reliance is placed on the decision of their Lordships of the Privy Council in the case of *Damodar Gordhan v. Deoram Kanji* (1). That case cannot however be taken to be on all fours with the present case or to afford us any real assistance in deciding the question before us. One of the points raised in that case was whether the Governor-General in Council could, by a Legislative Act purporting to make a notification in the Government Gazette conclusive evidence of a cession of territory, exclude enquiry as to the nature and lawfulness of that cession, the Governor-General in Council being expressly precluded by Act 24 and 25 Vic. c. 67 s. 22 from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India or as to the allegiance of British subjects; and their Lordships held that this could not be done. In that case the authority was expressly precluded, and it was held that authority could not be given and an inquiry as to its propriety excluded by a legislative enactment which purported

(1) (1876) I. L. R. 1 Bom. 367, 461.

to make a notification in the official Gazette conclusive proof of its legality. In the case before us the authority is expressly given by the section to Government to pass the order, and the section then goes on to provide that after the order has been notified in the Gazette that notification shall be conclusive evidence that the order has been duly made.

In the present case the provisions of section 101 clause 2 (a) of the Bengal Tenancy Act appear to have been complied with before the order was passed. Notice was served on the respondents and their objection was heard. The order was then passed and subsequently notified in the official Gazette. We hold that the discretion rested with the Local Government to determine whether the application was in due form under the provisions of section 101 clause 2 (a) and after the Local Government had decided that point and had issued the notification the jurisdiction of any Civil Court to interfere with the order was barred by clause 3 of the same section.

We may notice that the objection taken before us does not appear to have been raised before the Collector; that after the notification had issued the respondents appeared and attended at the proceedings before the Revenue Officer for the settlement and record-of-rights, and in fact fought out disputes in those proceedings with the tenants under section 106 and other sections of the Act. It was only when the proceedings were completed and the respondents were called on to pay their share of the costs that they instituted the suit and raised the question as to legality of the order of Government passed under section 101 clause 2 (a) of the Tenancy Act. In these circumstances, even if we had not found against them for other reason, we consider that they would not be entitled to succeed in the present suit.

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
PUERNENDU  
NARAYAN  
ROY.

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.

PURNENDU  
NARAYAN  
ROY.

Disagreeing, therefore, with the Subordinate Judge we hold that the order of the Local Government under section 101 clause 2 (a) of the Bengal Tenancy Act was passed by it under the powers expressly given to it by the law, that it was *intra vires* and was legal and binding on the parties and that the order for apportionment passed by the Local Government under section 114 of the Act against the plaintiffs respondents was also legal and binding as against them.

The second main question on which the lower Court decided the case in favour of the plaintiffs must in our opinion also be decided against them. The passage in the notice of the 25th September 1904 issued by the Assistant Settlement Officer to the plaintiffs, on which the plaintiffs relied, must be read with its context and considered as a part of the proceedings in the course of which it in fact issued—Reading from the words “Whereas the record-of-right of one estate cannot be completed without preparing the record of the other estate” etc. and following on we come to the passage relied on which is—“and though the Nawab Bahadur is alone responsible for the costs and you not only bear no cost but get the benefit of a record-of-right” etc. “he applies that Notification for the survey and record-of-rights of estate No. 254 be given in the official Gazette.” The learned Judge has held that by these words the Settlement Officer distinctly gave the plaintiffs to understand that “they would have to bear no cost.....all costs having been deposited by the Nawab of Murshidabad.” We are entirely unable to agree with that conclusion. The notice, though somewhat clumsily worded, embodied the application of the Nawab. That was to the effect that in order to make the proceedings valid and compel the plaintiffs to pay their share of the costs for the benefits they were to receive under the record-of-rights, it was

necessary to include their half share as proprietors of estate No. 254 in certain villages in the settlement proceedings which already covered the half share of the Nawab as proprietor of estate 253 in the same villages. The object of the notice was not to save the plaintiffs from costs but to make them liable for them, and this in fact they recognised in their petitions of objection. Even if the Assistant Settlement Officer had attempted to give any such undertaking, he would not have had power to do so under the provisions of the law. We find, therefore, that this second point must be decided against the plaintiff respondent.

The result, therefore, is that we decree the appeal, we set aside the findings and judgment and decree of the lower Court, and in lieu thereof direct that the suit of the plaintiffs be dismissed. The defendant appellant will recover his costs from the plaintiffs respondents in this Court and in the Court of first instance.

S. C. G.

*Appeal allowed.*

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
PUERNENDU  
NAKAYAN  
ROY.

## ORIGINAL CIVIL.

*Before Mr. Justice Fletcher.*

1912.

JOGEMAYA DASEE

July 8.

v.

AKHOY COOMAR DAS.\*

*Review—Vendor and purchaser—Conditions of sale, effect of—Title—Commissioner of Partition, sale by, not sale by Court—Rules and orders of the High Court, r. 426, scope of.*

Under an order of Court that he "be at liberty to sell" a Commissioner of Partition sold certain property by public auction. The conditions of sale, *inter alia*, stipulated that "there were no documents of title, except those mentioned in the abstract of title, that the purchaser should not be entitled to call for any other document, or to object to the title on the ground of the non-production thereof, and that no objection to the title should be allowed."

The purchasers at the auction subsequently obtained an order of Court directing the Registrar to enquire and report under rule 426 as to the vendor's title.

On an application for review of judgment :

*Held*, that the review must be granted on the ground that the sale was not a sale by the Court.

*Golam Hossein Cassim Ariff v. Fatima Begum* (1) and *Chandranath Biswas v. Biswanath Biswas* (2) followed.

The conditions of sale did not preclude the purchasers from raising the question of the vendor's title where it appeared (i) that the abstract of title commenced with a bond of indemnity which was in no sense a root of title, and (ii) that the abstract did not expressly disclose the nature of the title, or indicate that the property was subject to a permanent lease at a small rent.

## APPLICATION.

This suit was instituted for the partition of the estate of one Kedar Nath Das, and a Commissioner of Partition was duly appointed.

\* Application in original civil suit No. 400 of 1905.

(1) (1910) 16 C. W. N. 394.

(2) (1870) 6 B. L. R. 492n.



By two orders, made on the 23rd May 1910 and the 4th April 1911 respectively, it was, *inter alia*, ordered that the Commissioner of Partition "be at liberty to sell by public auction or private sale to the best purchaser or purchasers that could be got for the same, provided the said Commissioner should consider that a sufficient sum had been offered," certain premises, including No. 60, Chingreehatta Road in Calcutta . . . , "and that all parties should join in the said sale and execute proper conveyance or conveyances in respect thereof in favour of such purchaser or purchasers."

1912  
 JOGEMAYA  
 DASEE  
 v.  
 AKHOY  
 GOOMAR DAS.

The sale of the properties was duly advertised by the Commissioner to take place on the 29th July 1911: the notification of sale supplied a description of the properties, and intimated that "the abstract of title, plans of premises to be sold and conditions of sale may be seen at the office of the plaintiff's attorney, etc."

The abstract of title of the premises No. 60 Chingreehatta Road commenced with a bond of indemnity dated the 24th January 1904, indemnifying the past committee of a lunatic, and containing references to pedigree, but not particularly referring to the property itself.

Among the conditions of sale the following were relevant to the present application:—

"6. There are no documents of title, except those mentioned in the abstract of title; the purchaser shall not be entitled to call for any other document.

"7. The party having the carriage of the proceedings, shall within ten days after the sale deliver to the purchaser or his attorney an abstract of title to the lot purchased by him subject to the stipulations contained in these conditions.

"8. The parties to this suit have not in their possession or power, nor are they aware of the existence

1912

JOGEMAYA

DASEE

v.

AKHOY

COOMAR

DAS.

of, any documents of title except the abstracted documents, and the purchaser will not be entitled to call for the originals of any document or to object to the title on the ground of the non-production of any other documents.

"9. The purchaser shall assume the statement in the abstracted documents to be true, and shall accept the title as disclosed in the abstract and no objection to the title shall be allowed.

"12. Upon payment of the purchase money the purchaser shall be entitled to possession . . . . . and shall be entitled at his own expense to obtain a sale certificate from this Honourable Court or a proper conveyance wherein all proper parties shall join . . . . . The purchaser shall at his own cost take such steps as may be necessary for the purpose of obtaining possession of the lot purchased by him.

"17. . . . . The costs occasioned by the default of the original purchaser shall also be paid by him. An order containing these directions may also be obtained from a Judge in Chambers.

"18. The sale is to be deemed and treated for all purposes as a sale by the Court."

On the 29th July 1911, the premises No. 60 Chingreehatta Road were sold by the Commissioner of Partition by public auction for the sum of Rs. 8,250 to one Hajee Alla Joga and others.

Being dissatisfied with the title, on the 29th April 1912 the purchasers took out a summons for an order "that it may be referred to the Registrar of this Honourable Court to enquire and report whether the title to the said premises . . . . . is such as the said purchasers can be compelled to accept, and that in case the said Registrar should report that the title is not in order, the purchase

money . . . . may be refunded to the purchasers with interest . . . . or in the alternative that it may be referred to the Registrar to enquire as to the amount of compensation which should be allowed for the defect in the vendor's title, and for an order that the amount of such compensation be refunded to the purchasers . . . ."

1912

JOGEMAYA

DASEE

v.

AKHOY

COOMAR DAS.

On the 6th May 1912, Fletcher J. disposed of the summons and in the presence of counsel representing the purchasers, the plaintiff and the defendant respectively, made an order whereby "it was referred to the Registrar of this Court to enquire and report whether a good title can be made to the said property, etc."

An application was thereupon made by the defendant, Akhoy Coomar Das, to have the order set aside on the ground that the counsel briefed by him was unavoidably prevented from being present at the hearing of the summons, and his brief was held by another counsel who was not conversant with the facts and was so unable to place the defendant's case before the Court. This application was refused.

Thereupon the present application was made by the defendant for a review of the order of the 6th May 1912, and for an order that the same may be set aside on the ground of there being errors on the face of the record. The errors referred to in the petition for review were—(i) the sale of the premises not being a sale by the Court, the order of the 6th May should not have been made; (ii) having regard to the conditions of sale, the purchasers were not entitled to an enquiry as to whether a good title could be made to the premises.

*Mr. B. C. Mitter*, for the defendant-petitioner, Akhoy Coomer Das. An application for a review of

1912  
 JOGEMAYA  
 DASEE  
 v.  
 AKHOY  
 COOMAR DAS.

judgment will lie where there is an error of law on the face of the judgment: *Sharup Chand Mala v. Pat Dasee* (1). The order of the 6th May 1912 was erroneous, inasmuch as this Court could interfere only in respect of a sale *by* the Court. The sale in question was not a sale *by* the Court, but *under the authority* of the Court. The form of the orders of the 23rd May 1810 and 4th April 1911 was that the Commissioner of Partition "*be at liberty* to sell, etc": see *Chandranath Biswas v. Biswanath Biswas* (2), and *Golam Hossein Cassim Ariff v. Fatima Begum* (3), where a sale by a Receiver was held not to be a sale by the Court. This being so, rule 426 of the Rules and Orders has no application: rule 426 applies only to sales by the Registrar. Accordingly the Court should not have ordered the enquiry directed by the order of the 6th May 1912.

Secondly, the purchasers were not entitled to the enquiry as to title, as they were bound by the conditions of sale. The purchaser is bound by clear stipulations as to title in conditions of sale: Dart's Vendors and Purchasers, 7th edition, Vol. I, p. 163. Conditions 6, 8 and 9 of the conditions of sale were clear and unambiguous, and the purchasers were precluded from going behind the title as shewn in the abstract, and were not entitled to dispute or raise any question as to the vendor's title: *Hume v. Bentley* (4), *Nunn v. Hancock* (5), *In re National Provincial Bank of England and Marsh* (6).

*Mr. Pugh*, for the purchasers, Hajee Alla Joga and others. No ground has been made out for a review of judgment. The sale was a sale by the Court. It took place as the result of an order of Court in a

(1) (1887) I. L. R. 14 Calc. 627.

(2) (1870) 6 B. L. R. 492n.

(3) (1910) 16 C. W. N. 394.

(4) (1852) 5 De Gex. & Sm. 520.

(5) (1871) L. R. 6 Ch. App. 850.

(6) [1895] 1 Ch. 190.

partition suit. When a Commissioner of Partition by sells leave of the Court, he has no inherent power to sell, and he must be selling as the hand of the Court. It is in effect the same as a sale under the Partition Act when the Court sells. It makes no difference whether the Court sells through its Registrar or through a Receiver or a Commissioner of Partition. Persons rely on these sales as sales by the Court. In any event, there is an express condition (condition 18) which stipulates that the sale is to be treated as a sale by the Court, and it must be treated as such.

The conditions of sale do not preclude the purchasers from raising a question of title on a material encumbrance. It appears *aliunde* that the property is subject to a permanent lease at a small rent. It would be manifestly unfair if the purchasers were compelled to pay so substantial a sum as Rs. 8,250 for such a return. In order that the purchaser may be so precluded, the conditions of sale must clearly state the defect of title in express words and provide for it. General words will not cover such a defect. *Dart's Vendors and Purchasers; Key and Elphinstone's Precedents in Conveyancing.*

FLETCHER J. This is an application for the review of a judgment dated the 6th May 1912. The matter is in my opinion an exceedingly unfortunate one. On the 6th of May 1912 the purchaser at a sale held by the Commissioner of Partition under the provision of an order of the 23rd of May 1910 applied to the Court that a reference should be directed to the Registrar of the Court to enquire and report under rule 426 as to whether the vendor could make a title to the property. That order was made, and it was not then discussed as to whether the order was made in respect of an ordinary sale by the Court, or whether it was a sale out

1912  
JOGEMAYA  
DASEE  
v.  
AKHOY  
COOMAR DAS.

1912  
 JOGEMAYA  
 DASEE  
 n.  
 AKHOY  
 COOMAR DAS.  
 FLETCHER J.

of Court. Subsequently an application was made to have that order set aside on the ground that it was *ex parte*. It appearing, however, from the records of the Court that the persons who had the carriage of the proceedings were not unrepresented, that application was dismissed, and now an application is made to review the judgment on the ground that the sale was not by the Court, and also on the ground that it appears from the conditions of sale that the purchaser bound himself to accept whatever title the vendors might have in the property. The application is made on the ground that there is an apparent error on the face of the record.

Now, the first point is one I have dealt with before. In *Golam Hossein Cassim Ariff v. Fatima Begum* (1), I tried to point out the difference between a sale by the Court and a sale under the authority of the Court, or out of Court, a distinction which is well recognized in England, but is not so carefully recognized in this country. In one case the Court makes the title to the purchaser; in the other case the Courts only authorize either the parties to the suit or the person having the carriage of the proceedings to sell the property and to make a title to the purchaser. *Chandr nath Biswas v. Biswanath Biswas* (2) decided by Mr. Justice Macpherson is to the same effect, and there he decided that the addition of a condition that the conveyance should be settled by the Judge in Chambers, if the parties disagree, did not make the sale one by the Court. There is no doubt this is a matter of considerable importance in this country, as sales by this Court are taken to be of considerable value as establishing the title of the purchaser, and I cannot help regretting that in the present case, where it appears from the order of the 23rd of May 1910 that the Commissioner

(1) (1910) 16 C. W. N. 394.

(2) (1870) 6 B. L. R. 492n.

of Partition was only given liberty to sell by public auction, that conditions of the nature of condition 18 should be inserted in the conditions of sale. Condition 18 states that the sale is to be deemed and treated for all purposes as a sale by the Court, and the other conditions are all liable to lead the purchaser to believe that he is buying property, the title of which is going to be made to him by the Court: for instance you come across such a statement in the conditions as "the party having the carriage of the proceedings" and other conditions which would lead any person to believe that the sale was one by the Court. It seems to me that on that point the sale is not one by the Court, but is one made by the Commissioner of Partition under the authority of the Court.

The other argument which was addressed to me by Mr. B. C. Mitter is one of much graver import, because the one as to whether this is a sale by the Court or a sale out of Court is merely one of procedure as to whether the purchaser can apply on a summary proceeding in this suit to have the question decided, or whether he has to be relegated to a separate suit. The other point Mr. Mitter has raised goes to the root of the whole matter, because he says on conditions of sale like this the purchaser is bound whether the title is good, bad or indifferent, and whether the vendor can make any title or no title to the purchaser; the purchaser has bound himself by these conditions of sale that on the sale by the Commissioner of Partition he will take the title whatever it may be without enquiry or requisition, and the two conditions that he relies upon are first of all condition 6, which states that there are no documents of title except those mentioned in the abstract of title, and the purchaser shall not be entitled to call for any other document. The point that Mr. Mitter makes on that

1912

JOGEMAYA  
DASEE

v.

AKHOY  
COOMAR DAS.

FLETCHER J.

1912  
 JOGEMAYA  
 DASEE  
 v.  
 AKHOY  
 COOMAR DAS.  
 FLETCHER J.

is with reference to a document in the abstract. That document it is true is not a document dealing with the title of the property at all, but is a bond of indemnity. True it is that it contains recitals of importance relating to the pedigree, but not in any way of itself affecting the title to the property. He said the abstract commences with such a document and precludes the purchaser from requiring any evidence of title under condition 6. On the authorities I am not satisfied that that is so. The document of title with which the abstract commences or purports to commence has got to be, *prima facie*, a document which is a proper root of title, and a deed of indemnity indemnifying the past committee of a lunatic obviously has nothing to do with the title at all, and that document is in no sense a root of the title.

Then the other condition that he relied on is condition 9: "the purchaser shall assume the statement in the abstracted document to be true, and shall accept the title disclosed in the abstract, and no objection to the title shall be allowed." The first point Mr. Mitter has made on that is with reference to this deed of indemnity. The deed of indemnity not affecting the title, the purchaser is not bound to accept the recitals in that document as conclusive on matters relating to the title, unless he has by express condition contracted to do so.

The other portion of the conditions Mr. Mitter has relied upon is as to the purchaser accepting the title as disclosed in the abstract, and that no objection to the title shall be allowed. He says that the purchaser has agreed to buy whatever title the vendors may be able to transfer to him, though that title may be the mere right to receive a pepper-corn as rent from the property in perpetuity, or it may be nothing at all. That I do not agree with at all. It seems to me if you



are going to sell property to which you have got no title, or a remote or shadowy title, you ought to tell the purchaser in express and clear words what you intend to sell to him. It is not sufficient to dress the matter up and say that the purchaser shall accept the title as disclosed by the abstract and no objection shall be allowed, because that pre-supposes that an absolute title is to be shown by the abstract; but if it appears *aliunde*, as Mr. Pugh says, that they have evidence which, so far from showing that the vendors have an absolute right to convey to the purchaser, shows that the property is subject to a permanent lease at a small rent, then I have no doubt myself that the purchaser is not bound to accept such a title. It seems to me to hold otherwise would be a perfect scandal, that by a condition stating that the purchaser was to accept the title disclosed by the abstract the purchaser has bound himself to pay Rs. 8,000 in order that he might get nothing. I regret myself that the conditions of sale have been drawn in this form, and that a review of judgment must be granted on the ground that this is not a sale by the Court.

I think this is a case where I ought to make no order for costs.

*Application allowed.*

Attorney for the petitioner: *S. K. Deb.*

Attorneys for the opposite party: *G. C. Chunder & Co.*

J. C.

1912  
 JOGEMAYA  
 DASEE  
 v.  
 AKHOY  
 COOMAR DAS.  
 FLETCHER J.

1912  
 JOGEMAYA  
 DASEE  
 v.  
 AKHOY  
 COOMAR DAS.  
 FLETCHER J.

is with reference to a document in the abstract. That document it is true is not a document dealing with the title of the property at all, but is a bond of indemnity. True it is that it contains recitals of importance relating to the pedigree, but not in any way of itself affecting the title to the property. He said the abstract commences with such a document and precludes the purchaser from requiring any evidence of title under condition 6. On the authorities I am not satisfied that that is so. The document of title with which the abstract commences or purports to commence has got to be, *prima facie*, a document which is a proper root of title, and a deed of indemnity indemnifying the past committee of a lunatic obviously has nothing to do with the title at all, and that document is in no sense a root of the title.

Then the other condition that he relied on is condition 9: "the purchaser shall assume the statement in the abstracted document to be true, and shall accept the title disclosed in the abstract, and no objection to the title shall be allowed." The first point Mr. Mitter has made on that is with reference to this deed of indemnity. The deed of indemnity not affecting the title, the purchaser is not bound to accept the recitals in that document as conclusive on matters relating to the title, unless he has by express condition contracted to do so.

The other portion of the conditions Mr. Mitter has relied upon is as to the purchaser accepting the title as disclosed in the abstract, and that no objection to the title shall be allowed. He says that the purchaser has agreed to buy whatever title the vendors may be able to transfer to him, though that title may be the mere right to receive a pepper-corn as rent from the property in perpetuity, or it may be nothing at all. That I do not agree with at all. It seems to me if you

are going to sell property to which you have got no title, or a remote or shadowy title, you ought to tell the purchaser in express and clear words what you intend to sell to him. It is not sufficient to dress the matter up and say that the purchaser shall accept the title as disclosed by the abstract and no objection shall be allowed, because that pre-supposes that an absolute title is to be shown by the abstract; but if it appears *aliunde*, as Mr. Pugh says, that they have evidence which, so far from showing that the vendors have an absolute right to convey to the purchaser, shows that the property is subject to a permanent lease at a small rent, then I have no doubt myself that the purchaser is not bound to accept such a title. It seems to me to hold otherwise would be a perfect scandal, that by a condition stating that the purchaser was to accept the title disclosed by the abstract the purchaser has bound himself to pay Rs. 8,000 in order that he might get nothing. I regret myself that the conditions of sale have been drawn in this form, and that a review of judgment must be granted on the ground that this is not a sale by the Court.

I think this is a case where I ought to make no order for costs.

*Application allowed.*

Attorney for the petitioner: *S. K. Deb.*

Attorneys for the opposite party: *G. C. Chunder & Co.*

J. C.

1912  
 JOGEMAYA  
 DASEE  
 v.  
 AKHOY  
 COOMAR DAS.  
 FLETCHER J.



APPEAL by the plaintiff Naba Kishore Mandal.

1912

NABA  
KISHORE  
MANDAL  
v.  
ATUL  
CHANDRA  
CHATTERJI.

The plaintiff was a co-owner of the Bowali estate, and the defendant No. 1 was the Common Manager appointed by the District Judge of 24-Parganas under the provisions of section 95 of the Bengal Tenancy Act. Defendant No. 1 held that office from the 1st October 1905 till 16th November 1908. During the term of his office the Common Manager duly submitted his accounts and passed by the District Judge. The plaintiff brought this suit against the defendant No. 1 for accounts for the period he held his office of Manager and for recovery of such sum as would be found due by the plaintiff on taking accounts and damages for loss caused by the Manager's neglect or fraud to be ascertained from taking of accounts. The other co-owners not having joined in the suit were made *pro forma* defendants.

The defendant No. 1 pleaded, *inter alia*, that the suit was not maintainable; that he was not liable to render account to the plaintiff; that he had rendered account to the District Judge and obtained his discharge and as such he was not liable to render any further account.

The Court below gave effect to the objections raised by the defendant No. 1 and dismissed the suit. Against this decision the plaintiff appealed to the High Court.

*Babu Dwarka Nath Chuckerbutty* (with him *Babu Taruck Chunder Chuckerbutty*), for the appellant. Question is whether a Common Manager appointed under section 95 of the Bengal Tenancy Act is liable to account after he has been discharged, to the beneficiaries. I submit he is. In the Court below the defendant did not file any written statement, but upon a petition filed by him denying his liability,

1912  
 NABA  
 KISHORE  
 MANDAL  
 v.  
 ATUL  
 CHANDRA  
 CHATTERJI.

the Court dismissed the suit. It was wrong in doing so without taking any evidence. It was not a case simply for accounts, but also for damages. The Common Manager was charged with fraud. Under such circumstance a suit is maintainable: see *Mahomed Faiz Chowdhury v. Upendra Lal Singh Roy* (1). The mere fact that accounts are passed by the District Judge is not enough to hold that a Common Manager is not liable to account. The case of *Kshitish Chandra Acharjya Chowdhury v. Osmond Beeby* (2) supports my contention. The case of *Coomar Sattya Sankar Ghosal v. Golapmoni Debee* (3) lays down that a suit for wilful negligence against a Receiver would lie.

*Babu Mahendra Nath Roy* (with him *Babu Hemendra Nath Sen, Babu Chander Sekhar Banerjee* and *Babu Atul Krishna Roy*), for the respondent. The cases cited by the other side are all distinguishable. In those cases specific charges were made. In this case no specific sums have been claimed nor specific charges made. The judgment in the case reported in in 2 Ind. Cases cited by the other side, is based upon a previous case in which the appointment of the Manager was under section 93 of the Bengal Tenancy Act. There is a good deal of difference between an appointment under s. 93 and section 95 of the Act. The appointment under s. 95 is by the District Judge, and the Common Manager becomes an officer of the Court, and he is liable to render account to the District Judge only. He is not an agent of the proprietors. When an officer of the Court is created by the Statute and the Statute gives the power to the Court to pass his account, to sue such an officer the permission of the Court is necessary. The case of *Khitish Chandra Acharjya*

(1) (1909) 2 Ind. Cas. 597.

(3) (1900) 5. C. W. N. 223.

(2) (1912) I. L. R. 39 Calc., 587 ;

16 C. W. N. 516.

*Chowdhury v. Osmond Beeby* (1) is also distinguishable. That was not a suit for accounts, but was one for recovery of certain specific sums of money. A suit for a general account against a Common Manager is not maintainable. Common Manager being an officer of the Court, a suit against him is not maintainable without the leave of the Court: see *Miller v. Ram Ranian Chakravarti* (2), *Dunne v. Kumar Chandra Kisore* (3), *Pramatha Nath Gangooly v. Khetra Nath Banerjee* (4).

*Babu Taruck Chunder Chuckerbutty*, in reply.

*Cur. adv. vult.*

BRETT AND CHAPMAN JJ. The plaintiff is a co-sharer in the Bowali estate of which the *pro forma* defendants Nos. 2 to 20 are also co-owners. The defendant No. 1 was appointed Common Manager of this estate by the District Judge of the 24-Parganas under the provisions of section 95 of the Bengal Tenancy Act, and he held that office from the 1st October 1905 to the 16th November 1908, when he resigned. The present suit was instituted by the plaintiff on the 15th June 1909. The plaintiff states that he asked his co-sharers, the defendants Nos. 2 to 20, to join with him in bringing the suit but, as they refused, he made them *pro forma* defendants. The allegations made in the plaint are of a very indefinite character. They suggest generally that, during the period of his management, the defendant No. 1 failed to include in his accounts all the items which ought to have been included, and that he had been guilty of laches and carelessness in the management whereby the plaintiff had suffered damages; and the main prayers are that the defendant No. 1 may be ordered to render proper accounts during his time of

1912

NABA  
KISHORE  
MANDAL  
v.  
ATUL  
CHANDRA  
CHATTERJI.

(1) (1912) I. L. R. 39 Calc. 587. (3) (1902) I. L. R. 30 Calc. 593.

(2) (1884) I. L. R. 10 Calc. 1014. (4) (1904) I. L. R. 32 Calc. 270.

1912

NABA  
KISHORE  
MANDAL  
v.  
ATUL  
CHANDRA  
CHATTERJI.

management, and that, if after due audit and balancing of the accounts it be found that any sum is due to the plaintiff a decree may be passed in the plaintiff's favour for that sum, and, further, that the plaintiff may obtain a decree for damages for the loss he has sustained during the time that the defendant No. 1 was the Common Manager of the estate. The plaint concludes by saying that there being no means to ascertain correctly the amount that would be due to the plaintiff on rendition of accounts the plaintiff values for the present suit and claims Rs. 4,000 for accounts and Rs. 1,200 for damages.

The defendant No. 1 put in a written statement, in which he alleged that he had been appointed as Manager by the District Judge of the 24-Parganas, that he had submitted accounts to the District Judge, for the full period of his management, that those accounts had been audited and passed by the District Judge, and that no suit for accounts lay against him at the instance of the plaintiff.

The learned Subordinate Judge, after hearing the parties, was of opinion that the suit, as framed, was not tenable, and he accordingly dismissed it with costs.

The plaintiff has appealed, and, in his petition of appeal, the main grounds which are set forth are that the lower Court was in error in holding that the suit disclosed no cause of action and was not maintainable, that the Court below erred in holding that the suit was merely one for accounts, whereas it should have understood that the suit was also one for damages for negligence, misconduct and mismanagement, and that the Court below erred in the view which it took of the position of a Common Manager appointed under the provisions of the Bengal Tenancy Act, and in coming to the conclusion that the mere passing of the formal accounts by the District Judge would operate as a final



discharge of the Common Manager from all further liability.

As to these allegations, we may observe that the prayers in the plaint, in our opinion, disclosed that the suit was, in fact, one for a general account against the defendant No. 1 as Common Manager, and that it further sought to recover any sum that might be found due to the plaintiff on the passing of such accounts. The allegations against the defendant No. 1 of negligence, misconduct and mismanagement appear to be of a very vague and indefinite character.

In substance, the learned Subordinate Judge held that, as the defendant No. 1 had been appointed Manager by the District Judge under the provisions of section 95 of the Bengal Tenancy Act and as the duties and powers of that manager had been laid down by section 98 of the same Act, the Manager during his term of office was in fact an officer of the Court of the District Judge, and had to perform his duties subject to the orders and control of that officer alone, that he was in no respect the agent of the co-owners who by the order of the Judge appointing the Common Manager had been deprived of the management of the estate, and that, therefore, the manager was not liable to the co-owners to render accounts for the period of his management. The learned Subordinate Judge pointed out that it was admitted and proved from the record of the suit in which the defendant No. 1 was appointed Common Manager that the defendant No. 1 had duly submitted accounts as required by section 98 of the Bengal Tenancy Act, and that those accounts had been regularly audited and passed by the District Judge. The learned Judge accordingly found that the plaintiff was not competent in the present suit to succeed in his claim against the defendant No. 1 for accounts during the period he held the office as Manager.

1912

NABA  
KISHORE  
MANDAL  
v.  
ATUL  
CHANDRA  
CHATTERJI.

1912

NABA  
KISHORE  
MANDAL  
v.  
ATUL  
CHANDRA  
CHATTERJI.

It appears that, in the lower Court, the plaintiff relied on the decision of this Court in the case of *Coomar Sattya Sankar Ghosal v. Ranee Golapmonee Debee* (1) in support of his contention that, in spite of the fact that the defendant No. 1 had rendered accounts to the District Judge, the plaintiff was not thereby debarred from bringing a suit against him for damages which had resulted from his mismanagement or misconduct. The learned Judge pointed out that, in the suit as framed, there was no claim for damages for any specific act, amounting to abuse or misuse of the manager's authority, or for acts done in excess of or in contravention of the powers given to the defendant, and that, therefore, the plaintiff was not entitled to recover any amount from the defendant.

In support of the case set up by the plaintiff appellant in his memorandum of appeal the learned pleader who appears in his behalf has argued that the lower Court ought to have given the plaintiff an opportunity of supporting the allegations set out in the plaint, and that, if the learned Judge was prepared to deal with the case on the plaint alone, he ought to have proceeded on the assumption that the allegations in the plaint were true. He has also argued that the defendant No. 1 was not relieved from his liability to account in the present suit by the fact that his accounts had been passed by the District Judge, but that it was open to the plaintiff in the present action to recover from the defendant No. 1 any sums which might be found due to him on a proper balancing of the accounts; and, in support of this view, he has relied on the decisions of this Court in the cases of *Coomar Sattya Sankar Ghosal v. Ranee Golapmoni Debee* (1) and *Khitish Chandra Achariya Chowdhury v. Osmond Beeby* (2).

(1) (1900) 5 C. W. N. 223.

(2) (1912) I. L. R. 39 Calc. 587 ;

16 C. W. N. 516.

Neither of these two cases appear to us to be any authority to support the appellant in the present appeal. The first was the case of a Receiver and the suit was in respect of certain exceptions taken to the accounts filed by him, and the question raised was whether they were well-founded and could be determined when the accounts of the Receiver were referred to the Court to be passed. One of the questions raised was whether the Receiver would be accountable for *motussil* collections, and it was held that the proper course was either to postpone passing the accounts until the question of the Receiver's liability was established by a suit, or to pass the accounts reserving the right of the parties to establish any claim they might make against the Receiver in a suit properly framed for the purpose. The present suit is of an entirely different character. The allegations, so far as they can be gathered from the vague and indefinite manner in which they are stated, amount to exceptions to the accounts of the manager, and such exceptions should certainly have been made and dealt with at the time when the accounts were laid before the Court to be passed.

The other case dealt with the liability of an administrator *pendente lite*, in a suit brought after his discharge, to recover from him distinct sums of money mentioned in the plaint which, it was alleged, had been wrongfully retained by him. In that case, the accounts of the administrator had been duly submitted to the Court in the exercise of its testamentary jurisdiction and had been passed, but it was held that the mere fact that the accounts had been passed in the testamentary jurisdiction would not operate as a bar to prevent any of the beneficiaries of the estate afterwards from bringing an action before the Court, in the exercise of its general jurisdiction, to recover

1912

NABA  
KISHORE  
MANDAL  
v.  
ATUL  
CHANDRA  
CHATTERJI.

1912

NABA  
KISHORE  
MANDAL  
v.  
ATUL  
CHANDRA  
CHATTERJI.

certain specific sums of money not included in the accounts which, it was alleged, the administrator had wrongfully misappropriated. This case also has, in our opinion, no bearing on the facts of the present case.

We have already noticed that the allegations in the plaint are vague and indefinite and do not allege, as against the defendant No. 1, any misappropriation or retention of any specific sums of money belonging to the plaintiff. They merely suggest that there may have been acts of dishonesty but fail to specifically disclose them. This, therefore, is certainly not a suit in which the plaintiff seeks to recover from the defendant No. 1 certain specific sums of money which were not included in the accounts, and, therefore, the present case has nothing in common with the case of *Khitish Chandra Archarya Chowdhury v. Osmond Beeby* (1).

The allegations against the defendant No. 1 of mismanagement and misconduct, on which the claim for damages is based, are equally vague and indefinite. No specific act is set forth, and, on the plaint, as framed, it is impossible, for the Court to ascertain for what specific acts the plaintiff seeks relief. When the point was put to the learned pleader for the appellant that the suit ought, in the first instance, to have been dismissed on the ground that the allegations in the plaint were vague and indefinite, he suggested that the fact that in the concluding passage of the plaint the claim on account of accounts was set down at Rs. 4,000, and that for damages at Rs. 1,200, was sufficient to save the suit from failing on account of vagueness and indefiniteness. We do not think that that contention is sound for the claims for these sums are not based on any specific data and are, in fact, as vague and indefinite as the rest of the plaint. In our opinion, the suit should have been dismissed on that ground.

(1) (1912) I. L. R. 39 Calc. 587; 16 C. W. N. 516.

We have, however, to consider whether the learned Subordinate Judge was right in the view which he took that the present action would not lie for general accounts against the defendant No. 1 as Common Manager for the period during which he was managing the estate under the orders of the District Judge. We agree with the Judge of the lower Court in holding that a Common Manager appointed under section 95 of the Bengal Tenancy Act by the District Judge is an officer of the Court created by the statute and, for the purposes of his duties, strict rules are laid down in section 98 of the same Act. The manager is, in our opinion, so far as he holds his office and performs his duties under the provisions of the Act, in a position analogous to that of a Receiver appointed by the Court under the provisions of Order XL, rule 1 of the Civil Procedure Code, and is, in our opinion, entitled to the same protection, for the period during which he exercises his duties within the powers given to him by the Act, as a Receiver appointed by a Civil Court. The question which then arises for our determination is whether a Common Manager, who is an officer of the Court created by the statute and who has, in accordance with the provisions of the law which defines his duties, regularly submitted accounts for the period of his management to the District Judge, which accounts have been duly audited and passed by the District Judge, can be sued by one of the co-owners to render a general account for the whole period of his management. We hold that no such suit by one of the co-owners would lie. It has been pointed out by this Court in the case of *A. B. Miller v. Ram Ranjan Chakravarti*(1) that a Receiver appointed by the High Court does not represent the owner of the estate of which he is the Receiver but is

1912  
 NABA  
 KISHORE  
 MANDAL  
 v.  
 ATUL  
 CHANDRA  
 CHATTERJI.

(1) (1884) I. L. R. 10 Calc. 1014.

1912

NABA  
KISHORE  
MANDAL  
v.  
ATUL  
CHANDRA  
CHATTERJI.

merely an officer of the Court and, as such, cannot sue or be sued except with the permission of the Court; and, in the case of *Pramatha Nath Gangooly v. Khetra Nath Banerjee* (1), it was held that the sanction of the Court to an action against a Receiver appointed by the Court is a condition precedent to the right of the party to sue, and cannot be rectified by a subsequent application for permission to continue the action brought without such permission. During the time that an estate is under the management of a Common Manager, it is, so far as that management is concerned, really in the hands of the Court which has appointed the Manager and, in the management, the Common Manager acts as the agent of the Court and not as the agent of any of the co-owners. His position is, therefore, the same as that of a Receiver and, in these circumstances, no suit would lie against him by a co-owner for acts which have been sanctioned or approved by the Court. The order sheets of the case in which the defendant No. 1 was appointed Common Manager, which were filed, prove beyond any possibility of doubt that the defendant No. 1 duly submitted accounts to the District Judge for the whole period of his management and that full opportunity was given to all the co-owners including the plaintiff to examine the accounts and put in objections, and it appears that from time to time, objections were put in and were considered and disposed of by the Court. These proceedings were all in accordance with the provisions of the law, and it is not open to the plaintiff in the present action to question the legality or the correctness of the action taken by the District Judge. We must hold, therefore, that so far as the defendant No. 1, in compliance with the provisions of the law, submitted accounts to the District Judge for the period

of his management, and so far as those accounts were passed by the District Judge, he is not liable to be sued by the plaintiff for a general account. The learned pleader for the appellant has suggested that, though that protection might extend to the Common Manager during the period of his management, it is lost after his discharge and that it is open to any of the co-owners after the discharge of the Manager to sue him in respect of his conduct or management as Manager though that management was controlled by the District Judge. We think that this argument cannot be supported and that the protection which is extended to the Manager while he is in service is equally extended to him for the period of that service even after his discharge.

The question raised then is whether the plaintiff could sue the defendant No. 1 for misappropriation or retention of certain specific sums which had not been included in the account without first obtaining the sanction of the District Judge for the suit. We hold that, so far as those items are items which in the ordinary course of the management ought to have appeared in the account, and which the co-owner was aware at the time were not included in the account or with due enquiry might have discovered were not included in the account, no suit would lie except with the sanction of the District Judge. The co-owner would, however, not be debarred from bringing a suit against the manager for acts of misconduct or misappropriation done outside the limits of his authority as Common Manager under the Act. In the present instance, there is no proof whatever that any such acts have been committed by the Common Manager and, in these circumstances, we think the lower Court was perfectly right in the view which it took that the suit, as framed, was untenable.

1912

NABA  
KISHORE  
MANDAL  
v.  
ATUL  
CHANDRA  
CHATTERJI.

1912

NABA  
KISHORE  
MANDAL  
v.  
ATUL  
CHANDRA  
CHATTERJI.

merely an officer of the Court and, as such, cannot sue or be sued except with the permission of the Court; and, in the case of *Pramatha Nath Gangooly v. Khetra Nath Banerjee* (1), it was held that the sanction of the Court to an action against a Receiver appointed by the Court is a condition precedent to the right of the party to sue, and cannot be rectified by a subsequent application for permission to continue the action brought without such permission. During the time that an estate is under the management of a Common Manager, it is, so far as that management is concerned, really in the hands of the Court which has appointed the Manager and, in the management, the Common Manager acts as the agent of the Court and not as the agent of any of the co-owners. His position is, therefore, the same as that of a Receiver and, in these circumstances, no suit would lie against him by a co-owner for acts which have been sanctioned or approved by the Court. The order sheets of the case in which the defendant No. 1 was appointed Common Manager, which were filed, prove beyond any possibility of doubt that the defendant No. 1 duly submitted accounts to the District Judge for the whole period of his management and that full opportunity was given to all the co-owners including the plaintiff to examine the accounts and put in objections, and it appears that from time to time, objections were put in and were considered and disposed of by the Court. These proceedings were all in accordance with the provisions of the law, and it is not open to the plaintiff in the present action to question the legality or the correctness of the action taken by the District Judge. We must hold, therefore, that so far as the defendant No. 1, in compliance with the provisions of the law, submitted accounts to the District Judge for the period

(1) (1904) I. L. R. 32 Calc. 270.



of his management, and so far as those accounts were passed by the District Judge, he is not liable to be sued by the plaintiff for a general account. The learned pleader for the appellant has suggested that, though that protection might extend to the Common Manager during the period of his management, it is lost after his discharge and that it is open to any of the co-owners after the discharge of the Manager to sue him in respect of his conduct or management as Manager though that management was controlled by the District Judge. We think that this argument cannot be supported and that the protection which is extended to the Manager while he is in service is equally extended to him for the period of that service even after his discharge.

The question raised then is whether the plaintiff could sue the defendant No. 1 for misappropriation or retention of certain specific sums which had not been included in the account without first obtaining the sanction of the District Judge for the suit. We hold that, so far as those items are items which in the ordinary course of the management ought to have appeared in the account, and which the co-owner was aware at the time were not included in the account or with due enquiry might have discovered were not included in the account, no suit would lie except with the sanction of the District Judge. The co-owner would, however, not be debarred from bringing a suit against the manager for acts of misconduct or misappropriation done outside the limits of his authority as Common Manager under the Act. In the present instance, there is no proof whatever that any such acts have been committed by the Common Manager and, in these circumstances, we think the lower Court was perfectly right in the view which it took that the suit, as framed, was untenable.

1912  
NABA  
KISHORE  
MANDAL  
v.  
ATUL  
CHANDRA  
CHATTERJI.

1912

NABA  
KISHORE  
MANDAL  
v.  
ATUL  
CHANDRA  
CHATTERJI.

Our attention has been drawn, in the course of the argument, to an order recorded by the District Judge on the 15th June 1907. This dealt with certain objections raised and obstructions offered by the present plaintiff, Naba Kishore Mandal, to the management of the estate by the Manager, and the learned Judge distinctly recorded that the defendant No. 1 as Common Manager offered to let the plaintiff inspect the accounts, but that he refused to do so, that the plaintiff's pleader had frankly admitted that the plaintiff wanted to get rid of the Common Manager, and that, for that purpose, he was willing to let the estate be sold for default of Government revenue. The learned Judge observed that it was quite evident that Naba Kishore was an obstructionist and was throwing every obstacle in the way of the Common Manager. That being the view which the learned Judge felt constrained to take at that time, and the fact being that in the present plaint the allegations made against the defendant No. 1 are as vague and indefinite as possible, it seems to us that the present suit was not instituted by the plaintiff *bonâ fide* in order to recover any sum due to him on account of the estate, or for damages to which he was rightly entitled, but with the object of annoying and harassing the defendant No. 1, because the plaintiff was annoyed at the estate having been placed under the control and management of the Common Manager. It is, in our opinion, very essential that gentlemen accepting the office of Common Manager under the orders of the Court should be protected from actions brought after their discharge for the purpose of harassing them, and we hold that the present suit was a suit of such a class and that it has been properly dismissed. We, therefore, affirm the judgment and decree of the lower Court and dismiss the appeal with costs.

S. C. G.

*Appeal dismissed.*

**APPELLATE CRIMINAL.**

*Before Mr. Justice Holmwood and Mr. Justice Imam.*

NAZIMUDDIN

v.

EMPEROR.\*

1912

June 17.

*Assessors, examination of—Re-trial—Criminal Procedure Code (Act V of 1898), ss. 309, 403, 423, 439—Assessors not to be questioned until their opinions delivered and recorded—Rioting—Right of private defence—Practice.*

Section 309 of the Code of Criminal Procedure gives the Judge a discretion to sum up the evidence for the benefit of the assessors if he thinks necessary, but it gives him no power to question them until they have delivered their opinions orally and he has recorded such opinions.

When a conviction is set aside and a re-trial ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed, and having regard to the provisions of section 423 of the Code of Criminal Procedure, the provisions of section 403 in that respect cannot apply.

*Krishna Dhan Mandal v. Queen-Empress* (1) and *Queen-Empress v. Jabanulla* (2) referred to.

THE facts are shortly these. About eight years ago one Amzad Hawaldar married the widow of Azimuddin, brother of accused Nazimuddin.

Azimuddin had died leaving him surviving his widow, two sons and three daughters. Both the sons were minors—one of them was living with Amzad, his stepfather and the other with his uncle Nazimuddin, the appellant.

\* Criminal appeal, No. 225 of 1912, against the order of R. Garlick, Additional Sessions Judge of Backarganj, dated March 8th, 1912.

(1) (1894) I. L. R. 22 Calc. 377.      (2) (1896) I. L. R. 23 Calc. 975.

1912  
NAZIMUDDIN  
v.  
EMPEROR.

According to Amzad the two brothers were separate and the disputed plot of land—the cause of the fatal riot—was in the exclusive possession of the deceased Azimuddin. But Amzad admitted that though the disputed plot of land was in the exclusive possession of Azimuddin, it was not made over to him by Nazimuddin until only about a year ago, when it was done so for the maintenance of the minor in his charge. The story therefore was that Amzad had grown crop on it and when he had gone to reap it with the help of his labourers on the day of the occurrence, the accused Nazimuddin came with a large number of men and attacked them.

The accused claimed the right of private defence, contending that he was in possession of the disputed plot of land and that Amzad was an aggressor, and that what he did, he did in self-defence.

The accused was committed to the Sessions under sections 148 and 304 of the Indian Penal Code. The Additional Sessions Judge of Backerganj, disagreeing with both the assessors as to the innocence of the accused, though agreeing with their findings of facts, sentenced the accused Nazimuddin to 2 years' rigorous imprisonment under section 147 of the Penal Code. Against this conviction the accused appealed to the High Court.

*Mr. Arthur Caspersz and Babu Raiendra Chandra Guha*, for the appellant.

*The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown.

*Cur. adv. vult.*

HOLMWOOD AND IMAM JJ. This is an appeal from the conviction and sentence passed by the learned Additional Sessions Judge of Backerganj upon one Nazimuddin. The Judge, disagreeing with both the

assessors as to the innocence of the accused, though he says he agrees with their findings of fact, has sentenced the appellant Nazimuddin to 2 years rigorous imprisonment under section 147 of the Indian Penal Code.

1912  
NAZIMUDDIN  
v.  
EMPEROR.

The trial appears to us to be altogether vitiated by the fact that the assessors were not asked and apparently not allowed to give an independent opinion on the case.

We have pointed out to this learned Judge before, and we must do so again, that his method of cross-examining the assessors is entirely contrary to law, and results in grave miscarriage of justice. The law (section 309 of the Code of Criminal Procedure) gives the Judge a discretion to sum up the evidence for the benefit of the assessors if he thinks necessary but it gives him no power to question them until they have delivered their opinions orally and he has recorded such opinions.

If there is anything obscure in their verdict, there is no objection to the Judge asking questions to clear up such obscurity but he is bound to allow the assessors to express their own opinions independently in their own words on the whole case before interfering with them in any way or asking them any question whatever except what is your opinion. We never get a verdict on the facts from assessors who sit with this learned Judge and we are always greatly embarrassed in appeal by his erroneous practice.

But in this case the conviction cannot stand on the face of the judgment. The findings are throughout contradictory, and it is difficult to understand what the Judge meant to hold; but when he did find that the accused had the right of private defence in any case, he could not convict them or any of them of rioting. It is impossible that a man who is acting in the exercise of a legal right can be a member of an unlawful

1912  
NAZIMUDDIN  
v.  
EMPEROR.

assembly. Any person who exceeds the right of private defence is liable to be punished for the specific offence of culpable homicide or other crime which he may be found to have committed in excess of the right.

The conviction under section 147 is therefore, on the findings of the Judge, untenable and must be set aside. But we think there must be a re-trial in this case, since the conclusion that the accused had the right of private defence is erroneous on the Judge's own findings. He nowhere finds that the complainant had no *bonâ fide* claim to the paddy he was carrying away. He finds indeed to the contrary, that the complainant as guardian of his step-son, who was the rightful owner of the land left by his father, had been getting land for the boy's maintenance, and that lately owing to a quarrel the accused had arbitrarily denied his rights. He finds that complainant married the boy's mother 8 or 9 years before, and there had been no dispute hitherto, and therefore there must have been an amicable arrangement, which has recently broken down. But this does not make complainant a thief or a trespasser, and there is no right of private defence against a person asserting a *bonâ fide* right. Then again he finds that the assault did not take place in the field, but outside Afluddi's house where the complainant says it did, and that the attack was on the back of two defenceless laden coolies who were not committing any offence. He also seems convinced that it is quite likely that Nazimuddin struck the blow which killed Yakub Ali, but he says that the evidence is entirely that of the complainant and his men. Of course it is; the evidence for the prosecution must be used to prove the prosecution case. Independent persons are not likely to turn up in cases of this kind. He says people living

near should have been examined, but there is no allegation that any of them saw the occurrence. He does not say he has any reason to disbelieve the complainant and his witnesses. These are only a few examples of contradictory and inconsistent findings which we cannot further enlarge upon for fear of prejudicing the case on re-trial.

1912  
 NAZIMUDDIN  
 v.  
 EMPEROR.

When a conviction is set aside and a re-trial ordered it is settled law that the whole case is re-opened and the accused must be tried again on all the charges originally framed; and having regard to the provisions of section 423 of the Criminal Procedure Code, the provisions of section 403 in that respect cannot apply: *Krishna Dhan Mandal v. Queen-Empress* (1). We might, following the rule in *Queen-Empress v. Jabanulla* (2), alter the findings ourselves but in that case we should be precluded from interfering with the sentence; and, as pointed out by Banerjee J., this is not one of those cases where such an alteration could be made, inasmuch as the accused has been acquitted of the major charge and convicted on a very minor one. He can only be dealt with on the major charge by directing a re-trial which opens the whole case and places it upon the same footing as if there had been no previous trial at all.

We do not think it necessary to refer to our powers in revision under section 439, which we could exercise independently without any reference to section 417 which is a purely enabling section giving the Local-Government certain powers, and by implication taking them away from private parties, but not in any way touching the jurisdiction or revisional powers of this Court in all matters connected with criminal trials whether there has been a conviction or an acquittal. Had it been necessary to get over the

(1) (1894) I. L. R. 22 Calc. 377. (2) (1896) I. L. R. 23 Calc. 975.

1912  
 NAZIMUDDIN  
 c.  
 EMPEROR.

difficulty raised in *Krishna Dhan Mandal v. Queen-Empress* (1) by use of our revisional powers, we should have had no hesitation in using them. But the setting aside of a finding of the Sessions Court under section 423 enables this Court to order a re-trial, and it is now settled law that that order re-opens the whole case.

The conviction and sentence under section 147 is set aside, and a re-trial ordered on the original charges before the learned Sessions Judge of Backerganj who will approach the case with an open mind.

*Conviction set aside ;  
 re-trial directed.*

S. K. B.

(1) (1894) I. L. R. 22 Cal. 377.

## CRIMINAL REVISION.

*Before Mr. Justice Holmwood and Mr. Justice Imam.*

1912  
 June 28,

SITA AHIR

v.

EMPEROR.\*

*Charge—Omission to frame charge—Rioting—Causing hurt—Conviction for an offence other than the one charged with—Error of law—"Error omission or irregularity"—Criminal Procedure Code (V of 1898), ss. 535, 537(a)—Practice.*

Sections 535 and 537(a) of the Criminal Procedure do not apply to a case where the accused is charged with one offence and convicted of another—totally different to the one he was charged with. Section 233 is mandatory ; for every distinct offence of which any person is accused there

\* Criminal Revision, No. 786 of 1912, against the order of H. E. Spry, Joint Magistrate of Shahabad, dated March 19, 1912.



shall be a separate charge, and every charge shall be tried separately, except in the case mentioned in ss. 234, 235, 236 and 239 of the Code.

Section 236 refers to a series of acts which are of such a nature that it is doubtful which of the several offences the facts constitute.

To convict an accused of murder on a charge of rioting or to commit him to the Sessions without framing a charge would be *not* merely an irregularity but an error of law vitiating the trial.

THE petitioners, Sita Ahir and others, were charged with committing riot on the 8th of July 1911 with the common object of voluntarily causing hurt to the complainant and dispossessing him of his field. The case was tried by the Sub-Deputy Magistrate of Buxar, who convicted them under section 147 of the Indian Penal Code and sentenced them to six months' rigorous imprisonment. Against this order of the Sub-Deputy Magistrate the petitioners appealed to the Joint Magistrate of Buxar, who held that the complainant on the day of occurrence was not in possession of the field which he claimed as his, and therefore he had no right to unyoke the ploughs of the petitioners when engaged in ploughing the field. Accepting the right of private defence, the learned Joint-Magistrate acquitted the petitioners of the charge under section 147 of the Indian Penal Code. He, however, convicted them under section 323 of the Indian Penal Code for assault upon one Ramsarup, one witness for the prosecution, and sentenced them to six months' rigorous imprisonment, on the ground that Ramsarup, having no connection with the disputed field, the attack on him was totally unwarranted.

The petitioners thereupon moved the High Court and obtained this Rule.

*Babu Manmatha Nath Mukherjee*, for the petitioners.

No one appeared for the Crown.

1912

SITA AHIR  
v.  
EMPEROR.

1912  
SITA AHIR  
v.  
EMPEROR.

HOLMWOOD AND IMAM JJ. We are of opinion that this Rule must be made absolute on the ground on which it was issued.

The petitioners were charged with rioting under section 147 with the common object of causing hurt to the complainant and with other objects with which we are not concerned. They have been convicted of causing hurt to another person, and the learned Magistrate in his explanation maintains that on the finding that the injuries caused to the complainant were covered by the right of private defence of property, but that the injuries caused to Ramsarup were not so covered, the Magistrate was justified in convicting the accused under section 323 and sentencing them to undergo six months' rigorous imprisonment each. He says that the omission to frame a charge is immaterial, because there was no prejudice, inasmuch as evidence was produced on both sides as to the responsibility for the injuries caused to Ramsarup, and had a charge under section 323 been framed, the matter could not have been more fully investigated, and it cannot be said that the accused have been in any way prejudiced in their defence or misled as to the nature of the charge against them. Had such a charge been framed, or were the case now remanded for re-trial, it would have to be decided on precisely the same evidence as has already been recorded.

Now, admitting all that the Magistrate puts forward, it is clear that under the law this conviction is not merely irregular but illegal. Section 233 is mandatory; for every distinct offence of which any person is accused there shall be a separate charge, and every charge shall be tried separately, except in the case mentioned in sections 234, 235, 236 and 239. We presume, that the Magistrate relies upon section 535 as covering this case. That section says that no finding

or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless in the opinion of the Court of appeal or revision a failure of justice has in fact been occasioned thereby. Now "merely on the ground that no charge was framed" must in our opinion mean a case where the offence being a petty one and the evidence being fairly taken, the Court framed no charge at all. But where the Court has framed a charge, then it cannot be said that the conviction is invalid merely on the ground that no charge was framed. We cannot deal with this case under that section. A charge was framed, and that charge has distinctly included the causing of hurt to the complainant, and the accused has been convicted of a totally different matter which was not charged at all. Then it cannot either come under section 537 (a) "any error or omission or irregularity in the charge." It is clear that the accused could raise no objection, as he could have had no idea that he is going to be tried upon this particular charge, there being a specific charge against him. It is not an omission in the charge which has been framed; it is the total omission to frame a charge upon the offence for which he has been convicted. Then section 232 does not help him, that is "if any appellate Court or the High Court in the exercise of its powers of revision is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit."

Now, it is impossible for us to say that the accused have not been prejudiced. Supposing in the course of a trial for rioting, as we have before pointed out, the evidence shows that murder has been committed, can it be said that the accused can be convicted of murder

1912

SITA AHIR

v.

EMPEROR.

1912  
SITA AHIR  
c.  
EMPEROR.

by the Magistrate on the charge of rioting, or that he can be committed to the Sessions without any charge being framed. The matter is not an irregularity but an error of law which vitiates the trial.

Then we come to section 237 which deals with a case where in the case, mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section. But this does not apply, because section 236 only refers to a series of acts which are of such a nature that it is doubtful which of the several offences the facts constitute. Now, here there was no doubt whatever about what was charged, nor on the evidence, as the Magistrate says, about hurt being caused to Ramsarup. That was not the question whether the man should be convicted of causing hurt to Ramsarup. The conviction of rioting and causing hurt to another man are questions totally different and independent, and the trial should also have been on a distinct and separate charge.

We see that the Magistrate has fallen into another error by not framing a charge, for the medical report shows that Ramsarup had both bones of his legs fractured which is ofcourse a case of grievous hurt.

The conviction and sentence must be set aside, and a re-trial ordered on a charge properly framed under section 325 or 323 of the Indian Penal Code. The petitioners meanwhile will remain on the same bail.

S. K. B.

*Re-trial ordered.*

## APPELLATE CIVIL.

*Before Justice Sir Asutosh Mookerjee and Mr. Justice Beachcroft.*

PRASANNA KUMAR MOOKERJEE

1912

*v.*

July 2.

SRIKANTHA ROUT.\*

*Adverse possession—Ghatwali tenure—Non-payment, or discontinuance of payment, of rent—Estoppel—Acquiescence—Misrepresentation—Grantor and Grantee—Homestead land—Sale by the Collector under the Public Demands Recovery Act (XI of 1859)—Sale certificate—Title of auction purchaser—Limitation Act (IX of 1908) s. 2 (8), Sch. I, Art. 144—Transfer of Property Act (IV of 1882) s. 43—Evidence Act (I of 1872) s. 115.*

At an execution sale under the Public Demands Recovery Act, the right, title and interest in a certain homestead land forming part of a *ghatwali* tenure was sold in 1878 by the Collector. In the sale certificate granted to the auction purchaser the land was described as rent-free and, as a matter of fact, no rent was ever paid to the *ghatwal* or anybody by the judgment debtor, or after him, by the auction purchaser. In 1888 the plaintiff, an infant of 4 years of age, succeeded as *ghatwal* on the relinquishment of the office by his father. Thereafter, by an agreement between the young *ghatwal*, the Maharajah of Burdwan, who was the superior zemindar, and the Government, the young *ghatwal* relinquished the office on condition that the property should be treated as resumed by the State to be settled permanently with the Maharajah, by whom it would be granted in *mokarari* to the retiring *ghatwal*. This arrangement was carried out, and in 1895 the plaintiff obtained the *mokarari* settlement from the Maharajah. In 1902 the plaintiff attained majority, and in 1904 he brought a suit to eject the representatives of the auction-purchaser from the homestead land and to recover possession of the same.

*Held*, that mere non-payment of rent or discontinuance of payment of rent did not by itself constitute adverse possession.

\* Appeal from Appellate Decree, No. 1429 of 1910, against the decree of J. N. Mitra, District Judge of Bankura, dated Dec. 23, 1909, affirming the decree of Ramaprasad Maitra, Munsif of Bankura, dated Jan. 26, 1906.

1912

PRASANNA  
KUMAR  
MOOKERJEE  
v.  
SRIKANTHA  
ROUT.

*Madan Mohan Gossain v. Kumar Rameswar Malia*(1), *Troyluckha Tarinee Dossia v. Mohima Chunder Muttuck*(2), *Rungo Lall Mundul v. Abdool Guffoor* (3), *Poresh Narain Roy v. Kassi Chunder Talukdar*(4), *Musyatulla v. Noorzahan* (5), *Prem Sukh Das v. Bhupia* (6), referred to.

*Held*, also, that in a suit of this description article 144 of the Limitation Act must be applied and the plaintiff as *ghatwal* did not claim through his father as his predecessor within the meaning of section 2 of the Limitation Act.

*Ram Chunder Singh v. Madho Kumari* (7) referred to.

*Held*, further, that the plaintiff, when he succeeded as *ghatwal*, was an infant, and as he commenced the present suit within three years from the attainment of majority, the plea of limitation could not be sustained.

*Held*, further, that no title by estoppel accrued in favour of the purchaser at the certificate sale. There was no estoppel in this case as against the decree-holder, and the appellants as representatives of the purchaser at the certificate sale could not avail themselves of any possible estoppel against the Secretary of State or against the plaintiff as grantee from him through the Maharajah of Burdwan.

*Held*, further, that even if there had been any estoppel available against the Secretary of State, there could have been none against the plaintiff; none was created by reason of what happened in 1888, because the estate did not then vest in the Crown to be granted afresh to the plaintiff, nor was any created by reason of what happened in 1895, because the so-called after-acquired title of the Secretary of State was acquired by him on condition that a clear title would be granted to the Maharajah of Burdwan as zemindar and to the plaintiff as *mokararidar* under him.

The doctrine of estoppel does not apply where an after-acquired title is taken by the grantor under a conveyance made to him as a conduit and for the purpose of vesting the title in a third person.

SECOND APPEAL by the defendants, Prasanna Kumar Mookerjee and others.

This suit related to a plot of *bastu* or homestead land situate within the Bankura Municipality. This plot of land was *ghatwali shadiali chakran* land and was held by one Gopal Chunder Mookerjee under the

(1) (1907) 7 C. L. J. 615.

(2) (1867) 7 W. R. 400.

(3) (1878) I. L. R. 4 Calc. 314.

(4) (1878) I. L. R. 4 Calc. 661.

(5) (1883) I. L. R. 9 Calc. 808.

(6) (1879) I. L. R. 2 All. 517.

(7) (1885) I. L. R. 12 Calc. 484 ;

L. R. 12 I. A. 188.

*ghatwal*. In 1878 Gopal Chunder Mookerjee's right, title and interest in the said homestead land was sold by the Collector in execution of a certificate under the Public Demands Recovery Act (XI of 1859) and was purchased by one Dwarkanath Mookerjee. The sale certificate given to the purchaser described the land as *niskar*, or rent-free, and the purchaser, after his purchase never paid rent for the land to the *ghatwal* or to anybody. In fact, no such rent had been paid even before the purchase. In 1888 Srikantha Rout, who was then about 4 years of age, was appointed *ghatwal* on the relinquishment of the office by his father. Thereafter, by an agreement between the young *ghatwal*, the Maharajah of Burdwan as superior zemindar and the Government, the young *ghatwal* relinquished his office, on condition that the property should be considered as resumed by the State to be settled permanently with the Maharajah of Burdwan by whom it would be granted in *mokarari* to the young *ghatwal*. The land was thereupon resumed by Government and settled with the Maharajah of Burdwan, who in 1895 let out the same in *mokarari jama* to the young *ghatwal*. About a year after Srikantha Rout was released from *shadiali* duties. In 1902, he attained majority and brought a suit on the 16th June 1904, against Dwarkanath Mookerjee, who was subsequently represented by his sons as defendants 1 to 7, for possession of the land in dispute, and he made the Maharajah of Burdwan a *pro forma* defendant in the suit. He alleged that Gopal Chunder Mookerjee's interest was not a transferable one under the *ghatwal* and, therefore, Dwarkanath Mookerjee acquired no valid title by his purchase at the certificate sale in 1878. The defence mainly was that the defendants denied the *mokarari* title of the plaintiff, that the suit was barred by limitation, and that the

1912

PRASANNA  
KUMAR  
MOOKERJEE  
v.  
SRIKANTHA  
ROUT.

1912

PRASANNA  
KUMAR  
MOOKERJEE  
v.

SRIKANTHA  
ROUT.

plaintiff was estopped from alleging that Gopal Chunder Mookerjee's interest was not transferable. This suit having been decreed by both the Courts below, the defendants appealed to the High Court.

*Babu Bipin Behary Ghose* (with him *Babu Satish Chandra Mookerjee*), for the appellants. This suit, I submit, is barred by limitation. The defendants' father, Dwarkanath Mookerjee, purchased in 1878 the right, title and interest of Gopal Chunder Mookerjee in certain homestead lands for which no rent has been paid prior to 1878. The defendants have, therefore, been in adverse possession of the land in dispute for over 12 years.

If the plea of adverse possession is not sustainable and the suit is not barred by limitation, my submission is, that the plaintiff is estopped from denying the title of the defendants. In 1878, when the land was sold by the Collector on behalf of the Secretary of State for India in Council, the sale was acquiesced in by the *ghatival* and Dwarkanath Mookerjee purchased it as a saleable rent-free land on the representation of the Collector, who by enforcing the certificate under the Public Demands Recovery Act against Gopal Chandra Mookerjee, intentionally caused or permitted the purchaser to believe that he was purchasing a saleable rent-free property and to act upon that belief. There was, therefore, no reason for the purchaser on this representation to enquire as to the true character of the property he was purchasing and what is more, there is no evidence on record to show that the purchaser knew of its true character. The plaintiff derives his title through the Secretary of State and under the provisions of section 115 of the Evidence Act, he cannot dispute the defendants' title : see *Sarat Chunder Dey v. Gopal Chunder Laha* (1). Subsequently



in 1888, when the property was relinquished by the plaintiff's father as *ghatwal*, it reverted to the Crown and the Secretary of State would not be permitted under the provisions of section 43 of the Transfer of Property Act to contest the title of Dwarkanath Mookerjee, the execution purchaser, still less would the plaintiff, who derived his title from the Secretary of State on his appointment as *ghatwal*, be permitted to dispute the defendants' title. Furthermore, the plaintiff himself in 1895, relinquished his office as *ghatwal* and the property in dispute again vested in the Secretary of State, by whom it was subsequently settled permanently with the Maharajah of Burdwan and a fresh grant in *mokarari* was made to the plaintiff by the Maharajah. These transactions, I submit, were all subject to the defendants' interest in the land, and the estoppel which would operate against the Secretary of State would also operate against the Maharajah and through him against the plaintiff.

*Babu Narendra Chandra Bose* and *Babu Charu Chandra Biswas*, for the respondent. The property in dispute was sold for arrears under the Public Demands Recovery Act; but the Collector did not sell it as his own property. The right, title and interest of the judgment-debtor was purchased by the defendants' father and it turned out by mistake that it was not revenue-free property. In the event of a mistake intentionally made, the Collector, I submit, would be bound to make good the loss. There is no finding of acquiescence by the *ghatwal* in the sale by the Collector. At the time of the relinquishment, there was no dispossession of the *ghatwal*. What happened was that, when one *ghatwal* retired, another stepped in and, therefore, there was no reversion of the property to Government. My submission is that Dwarkanath Mookerjee and his sons were all aware

1912

PRASANNA  
KUMAR  
MOOKERJEE  
v.  
SRIKANTHA  
ROUT.

1912

PRASANNA  
KUMAR  
MOOKERJEE  
v.  
SRIKANTHA  
ROUT.

plaintiff was estopped from alleging that Gopal Chunder Mookerjee's interest was not transferable. This suit having been decreed by both the Courts below, the defendants appealed to the High Court.

*Babu Bipin Behary Ghose* (with him *Babu Satish Chandra Mookerjee*), for the appellants. This suit, I submit, is barred by limitation. The defendants' father, Dwarkanath Mookerjee, purchased in 1878 the right, title and interest of Gopal Chunder Mookerjee in certain homestead lands for which no rent has been paid prior to 1878. The defendants have, therefore, been in adverse possession of the land in dispute for over 12 years.

If the plea of adverse possession is not sustainable and the suit is not barred by limitation, my submission is, that the plaintiff is estopped from denying the title of the defendants. In 1878, when the land was sold by the Collector on behalf of the Secretary of State for India in Council, the sale was acquiesced in by the *ghatival* and Dwarkanath Mookerjee purchased it as a saleable rent-free land on the representation of the Collector, who by enforcing the certificate under the Public Demands Recovery Act against Gopal Chandra Mookerjee, intentionally caused or permitted the purchaser to believe that he was purchasing a saleable rent-free property and to act upon that belief. There was, therefore, no reason for the purchaser on this representation to enquire as to the true character of the property he was purchasing and what is more, there is no evidence on record to show that the purchaser knew of its true character. The plaintiff derives his title through the Secretary of State and under the provisions of section 115 of the Evidence Act, he cannot dispute the defendants' title: see *Sarat Chunder Dey v. Gopal Chunder Laha* (1). Subsequently

(1) (1892) I. L. R. 20 Calc. 296.

in 1888, when the property was relinquished by the plaintiff's father as *ghatwal*, it reverted to the Crown and the Secretary of State would not be permitted under the provisions of section 43 of the Transfer of Property Act to contest the title of Dwarkanath Mookerjee, the execution purchaser, still less would the plaintiff, who derived his title from the Secretary of State on his appointment as *ghatwal*, be permitted to dispute the defendants' title. Furthermore, the plaintiff himself in 1895, relinquished his office as *ghatwal* and the property in dispute again vested in the Secretary of State, by whom it was subsequently settled permanently with the Maharajah of Burdwan and a fresh grant in *mokarari* was made to the plaintiff by the Maharajah. These transactions, I submit, were all subject to the defendants' interest in the land, and the estoppel which would operate against the Secretary of State would also operate against the Maharajah and through him against the plaintiff.

*Babu Narendra Chandra Bose* and *Babu Charu Chandra Biswas*, for the respondent. The property in dispute was sold for arrears under the Public Demands Recovery Act; but the Collector did not sell it as his own property. The right, title and interest of the judgment-debtor was purchased by the defendants' father and it turned out by mistake that it was not revenue-free property. In the event of a mistake intentionally made, the Collector, I submit, would be bound to make good the loss. There is no finding of acquiescence by the *ghatwal* in the sale by the Collector. At the time of the relinquishment, there was no dispossession of the *ghatwal*. What happened was that, when one *ghatwal* retired, another stepped in and, therefore, there was no reversion of the property to Government. My submission is that Dwarkanath Mookerjee and his sons were all aware

1912

PRASANNA  
KUMAR  
MOOKERJEE  
v.  
SRIKANTHA  
ROUT.

1912  
PRASANNA  
KUMAR  
MOOKERJEE  
v.  
SRIKANTHA  
ROUT.

that the property in dispute was non-saleable, revenue-paying property and the lower Appellate Court meant to find that they were so aware, and, as a matter of fact, the District Judge has found that Dwarkanath Mookerjee presumably knew that the disputed land was included in the *ghatwali* tenure.

As regards limitation, adverse possession must be reckoned from the date when the possession of the defendants became adverse, the plaintiff's right dates from 1895, when, according to the finding of the District Judge, there was a disturbance of possession. In that year the Collector gave the plaintiff *jagir* of the land in dispute and, if there be any adverse possession, it must be reckoned from this period. Reckoning it even from 1888, this suit was brought within 3 years from the date when the plaintiff attained majority. This suit, therefore, is not barred by limitation. Inasmuch as the Collector granted the *ghatwal* the *jagir*, he and not the *ghatwal* must refund the money and make good the defendants' loss from the Collectorate. Both the pleas of limitation and of estoppel are, therefore, untenable and this suit must be dismissed.

*Cur. adv. vult.*

MOOKERJEE J. This is an appeal on behalf of the defendant in an action in ejectment. The subject matter of the dispute is homestead land within the Bankura Municipality, originally held by one Gopal Chandra Mookerjee under a *ghatwal*. In 1878, the Collector, in execution of a certificate under the Public Demands Recovery Act made against Gopal Chandra Mookerjee, sold his right, title and interest in the homestead. Dwarkanath Mookerjee, now represented by his sons, defendants appellants, purchased the homestead. and in the sale certificate granted to him

the land was described as rent-free. The purchaser took possession of the homestead and never paid rent to the *ghatwal*; it has, indeed, been found that although Gopal Chandra Mookerjee held under the *ghatwal*, he never paid any rent up to the time when his interest was sold. In 1888, the *ghatwal* relinquished his office, and his son, the present plaintiff, then an infant four years old, succeeded as *ghatwal*. Shortly before 1895, by agreement between the *ghatwal*, the Maharajah of Burdwan who was the superior zemindar and the Government, the *ghatwal* relinquished the office on condition that the property should be treated as resumed by the State, to be settled permanently with the Maharajah of Burdwan by whom it would be granted in *mokarari* to the retiring *ghatwal* himself. This arrangement was carried out, and, in 1895, the plaintiff obtained the *mokarari* settlement from the Maharajah of Burdwan. In 1902, the plaintiff attained majority. On the 16th June, 1904, the plaintiff commenced the present action to eject the defendants as trespassers. His case in substance is that Gopal Chandra Mookerjee had no transferable interest under the *ghatwal*, and that consequently Dwarkanath Mookerjee, the father of the defendants, did not acquire any valid title by his purchase at the certificate sale in 1878. This is controverted by the defendants, who assert that Gopal Chandra Mookerjee along with his brother had a transferable rent-free right in the disputed property; they further contend that even if the alleged rent-free right is not established, they have acquired a good title against the plaintiff by estoppel and adverse possession. The primary Court has found on the evidence that Gopal Chandra Mookerjee had no transferable right in the disputed lands and that the doctrines of estoppel and adverse possession are of no assistance to the

1912

---

 PRASANNA  
KUMAR  
MOOKERJEE

v.

 SRIKANTHA  
ROUT.
 

---

 MOOKERJEE  
J.

1912  
 PRASANNA  
 KUMAR  
 MOOKERJEE  
 v.  
 SRIKANTHA  
 ROUT.  
 ———  
 MOOKERJEE  
 J.

defendants. The same view has been substantially accepted by the District Judge. The result has been that the Courts below have concurrently decreed the suit. On the present appeal, this decision has been assailed on behalf of the defendants on two grounds: *first*, that the claim is barred by limitation, and *secondly*, that the plaintiff is estopped from denying the title of the defendants.

In support of the first ground, reliance has been placed upon the circumstance that neither Gopal Chandra Mookerjee nor Dwarkanath Mookerjee ever paid any rent to the *ghatwal*. This, however, is clearly insufficient to constitute adverse possession, because mere non-payment of rent or discontinuance of payment of rent does not by itself constitute adverse possession: *Madan Mohan Gossain v. Kumar Rameswar Malia* (1), *Troyluckha Tarinee Dossia v. Mohima Chunder Muttuck* (2), *Rungo Lall Mundul v. Abdool Gutfloor* (3), *Poresh Narain Roy v. Kassi Chunder Talukdar* (4), *Musyatulla v. Noorzahan* (5), *Prem Sukh Das v. Bhupia* (6). It is, further, clear that in a suit of this description, Article 144 of the Limitation Act must be applied. Time, therefore, runs from the date when the possession of the defendants became adverse to the plaintiff. Now, although the term "plaintiff" as defined in section 2 includes a person from or through whom a plaintiff derives his right to sue, this does not affect the present plaintiff, who, as *ghatwal*, does not claim through his father as his predecessor: *Ram Chunder Singh v. Madho Kumari* (7). The plaintiff, when he succeeded as *ghatwal*, was an infant, and he has commenced the

(1) (1907) 7 C. L. J. 615.

(2) (1867) 7 W. R. 400.

(3) (1878) I. L. R. 4 Calc. 314.

(4) (1878) I. L. R. 4 Calc. 661.

(5) (1883) I. L. R. 9 Calc. 808.

(6) (1879) I. L. R. 2 All. 517.

(7) (1885) I. L. R. 12 Calc. 484; L. R. 12 I. A. 188.

present suit within three years from the attainment of majority. The plea of limitation cannot, therefore, be sustained.

In support of the second ground, it has been contended that the plaintiff now claims title from the Secretary of State for India in Council, and as the Collector on behalf of the Secretary of State represented the disputed homestead to be saleable rent-free land when he enforced the certificate against Gopal Chandra Mookerjee, neither the Secretary of State nor the plaintiff deriving title from him can repudiate the position. This argument raises a question of considerable nicety; but, even if the argument be assumed for a moment to be well founded on principle, there are two preliminary difficulties, which the appellants must overcome before they can derive any benefit from it. In the first place, the District Judge has observed that as the land was included in the *ghatwali* tenure, Dwarkanath Mookerjee, the father of the defendants, presumably knew the true state of facts. It has not been disputed that if the true state of facts were known to Dwarkanath Mookerjee, or if he had any means of acquiring a knowledge of the truth, neither he nor his representatives can invoke the aid of the doctrine of estoppel: *Carr v. The London and North-Western Railway Company* (1), *Proctor v. Bennis* (2), *Standish v. Ross* (3). A difficulty, however, is created by the fact that the District Judge has not indicated the circumstances from which the presumption is drawn, and the appellants assert that there is no evidence in support of the conclusion. A further difficulty is caused by the fact that the defendants may reasonably contend that they were misled by the definite

1912  
 PRASANNA  
 KUMAR  
 MOOKERJEE  
 v.  
 SRIKANTHA  
 ROUT.  
 ———  
 MOOKERJEE  
 J.

(1) (1875) L. R. 10 C. P. 307.

(2) (1887) 36 Ch. D. 740.

(3) (1849) 3 Exch. 527.

1912  
 PRASANNA  
 KUMAR  
 MOOKERJEE  
 v.  
 SRIKANTHA  
 ROUT.  
 MOOKERJEE  
 J.

representation as to the character of the property, and this is a sufficient excuse for the omission of Dwarka Nath Mookerjee to enquire into and to inform himself of the facts: *Redgrave v. Hurd* (1). In view of the two possible aspects just mentioned, I am not prepared to hold, without further investigation, that the question of estoppel does not arise. In the second place, no doubt, the only material on the record as to what took place in the certificate proceedings, is the sale certificate, and as pointed out in *Aman Ali v. Mir Hossain* (2), the foundation of the estoppel must be laid on a representation made before and not after the sale. From this point of view, the defendants would have to produce the sale proclamation, and the sale certificate would not by itself be sufficient to sustain the plea of estoppel. I am not prepared, however, to hold on this ground that the plea of estoppel does not arise; it is well known that the description in the sale certificate is taken from the description of the property in the sale proclamation, and as no objection was taken in the Courts below that the entry in the sale certificate did not by itself afford sufficient foundation for the plea of estoppel, the defendants would in fairness be entitled to an opportunity to produce a copy of the sale proclamation before their plea was negatived. From this point of view, also, further investigation would be necessary. I shall, therefore, now proceed to examine whether there is any substance in the plea of estoppel.

The argument upon the question of estoppel has been sought to be presented from two points of view. It has been suggested, in the first place, that when in 1888 the father of the plaintiff relinquished his office as *ghatwal*, the property reverted to the Crown, and the newly appointed *ghatwal* received

(1) (1881) 20 Ch. D. 1.

(2) (1909) 10 C. L. J. 605.



the grant qualified by the estoppel which binds the Secretary of State. In the second place, it has been suggested that in 1895 when the present plaintiff as *ghatwal* relinquished his office, the property vested in the Crown, and the subsequent grantee, the Maharajah of Burdwan, took his estate qualified by an estoppel against the Secretary of State. It is not necessary to consider at what precise point of time a possible estoppel could take effect against the Secretary of State, because I have arrived at the conclusion that as a matter of law no title by estoppel ever accrued in this case in favour of the purchaser at the certificate sale. The contention of the appellants is that, in the certificate proceedings, the Collector got the disputed properties sold as the saleable rent-free homestead of Gopal Chandra Mookerjee, and that, consequently, when the Collector himself obtained the property upon relinquishment by the *ghatwal*, he could not contest the title of the execution purchaser. In support of this position, reliance has been placed upon the doctrine recognised in section 43 of the Transfer of Property Act. This argument, in my opinion, is fallacious. It need not be disputed that if a grantor, who has no title or a defective title or an estate less than what he assumes to grant, conveys with warranty or covenants of like import, and subsequently, acquires the title or estate which he purports to convey, or, perfects his title, such after-acquired or perfected title will enure to the grantee or to his benefit by way of estoppel: *Trevivan v. Lawrence* (1), *Hermitage v. Tomkins* (2), *Re Horton* (3). This doctrine, however, can have no possible application to the case before us. In the case of a voluntary private alienation, the deed, either

1912

PRASANNA  
KUMAR  
MOOKERJEE  
v.  
SRIKANTHA  
ROUT.  
—  
MOOKERJEE  
J.

(1) (1704) 6 Modern 256.

(2) (1699) 1 Lord Raymond 729.

(3) (1884) 51 L. T. 420.

1912  
 PRASANNA  
 KUMAR  
 MOOKERJEE  
 v.  
 SRIKANTHA  
 ROUT.  
 —  
 MOOKERJEE  
 J.

expressly or by necessary implication, shows that the grantor intended to convey and that the grantee expected to become vested with an estate of a particular kind: the deed may consequently found an estoppel, although it contains no technical covenants. This is clear from an examination of the principle which underlies the doctrine that "an interest when it accrues feeds the estoppel:" *Christmas v. Oliver* (1), *Webb v. Austin* (2), *Hayne v. Maltby* (3), *Hamill v. Murphy* (4). Laws of England by Lord Halsbury, vol. XIII, sec. 529. The case of an execution sale, however, stands on an obviously different footing. The decree-holder does not guarantee the title of the judgment-debtor; the intending purchaser knows that under the law he can acquire nothing beyond the right, title and interest of the judgment-debtor. No doubt, the decree-holder himself, who is bound to notify before the sale all encumbrances on the property about to be sold, cannot subsequently set up against the execution purchaser a secret encumbrance in his own favour: *Doollub Sircar v. Kristo Coomar Bukshee* (5), *Munnoo Lal v. Lalla Choonee Lall* (6), *Doolee Chund v. Mussamut Omda Begum* (7), *Nursing Narain Singh v. Roghoobur Singh* (8), *Srimati Giribala Debia v. Srimati Rani Mina Kumari* (9), *Kasturi v. Venkatachalapathi* (10), *Ramchandra Vithuram v. Jairam* (11), *Sheshgiri Shanbhog v. Salvador Vas* (12) and *Husein v. Shankargiri Guru Shanbhugiri* (13). This estoppel,

(1) (1829) 10 B. & C. 181.

(2) (1844) 7 M. & G. 701.

(3) (1789) 3 T. R. 438.

(4) (1883) L. R. 12 Ir. 400.

(5) (1869) 12 W. R. 303.

(6) (1873) L. R. 1 I. A. 144 ;

21 W. R. 21.

(7) (1875) 24 W. R. 263.

(8) 1884) I. L. R. 10 Cal. 609.

(9) (1900) 5 C. W. N. 497.

(10) (1892) I. L. R. 15 Mad. 412.

(11) (1897) I. L. R. 22 Bom. 686.

(12) (1873) I. L. R. 5 Bom. 5.

(13) (1898) I. L. R. 23 Bom 119.

however, of which the execution purchaser may avail himself against the decree-holder, is based on the ground that it was the statutory duty of the decree-holder to notify before the sale all liens on the property inclusive of those held by himself. That principle is clearly of no assistance to the appellants. Even as regards the judgment-debtor, there has been considerable divergence of judicial opinion as to whether the execution purchaser can avail himself of an estoppel in respect of after-acquired title. To take one illustration, though in *Varnum v. Ahbat* (1) it was held that the extent of an execution raises an estoppel as much as in the case of conveyance, the contrary view, namely, that an execution sale of property not belonging to the judgment-debtor does not estop him from asserting against the purchaser title subsequently acquired, has been maintained in cases of recognised authority : *Emerson v. Sansom*, (2) *Fleuner v. Traveller's Insurance Company* (3), *Freeman v. Thayer* (4), *Meyendorf v. Frahner* (5), *Trey v. Ramsour* (6), *Jentry v. Wagstaff* (7), Bigelow on Estoppel, 1890, p. 396. It is clear, therefore, that there is no estoppel in this case as against the decree-holder. Consequently, the defendants appellants, as representatives of the purchaser at the certificate sale, cannot avail themselves of any possible estoppel against the Secretary of State or against the plaintiff as grantee from him through the Maharajah of Burdwan. It is further worthy of note that even if there had been any estoppel available against the Secretary of State, there could have been none against the plaintiff; none was created by reason of what happened in 1888, because

1912

PRASANNA  
KUMAR  
MOOKERJEE  
v.  
SRIKANTHA  
ROUT.  
—  
MOOKERJEE  
J.

(1) (1815) 12 Mass. 474 ;

7 Am. Dec. 87.

(2) (1871) 41 California 552.

(3) (1883) 89 Indiana 164.

(4) (1849) 29 Maine 369.

(5) (1879) 3 Mont. 282.

(6) (1872) 66 N. C. 466.

(7) (1832) 14 N. C. 370.

1912  
 PRASANNA  
 KUMAR  
 MOOKERJEE  
 v.  
 SRIKANTHA  
 ROUT.  
 MOOKERJEE  
 J.

the estate did not then vest in the Crown to be granted afresh to the plaintiff, nor was any created by reason of what happened in 1895, because the so-called after-acquired title of the Secretary of State was acquired by him on condition that a clear title would be granted to the Maharajah of Burdwan as zemindar and to the plaintiff as *mokararidar* under him. The doctrine does not apply where an after-acquired title is taken by the grantor under a conveyance made to him as a conduit and for the purpose of vesting the title in a third person: *Condit v. Bigelow* (1), *Phillippi v. Lee* (2), *Sutton v. Jenkins* (3). From every possible point of view, therefore, the plea of estoppel proves unsustainable.

The result is that the decree of the District Judge must be affirmed and this appeal dismissed.

BEACHCROFT J. I agree.

O. M.

*Appeal dismissed.*

- (1) (1903) 64 N. J. Eq. 504 ; (2) (1893) 19 Colo. 246 ;  
 54 Atlantic 160. 35 Pacific 540.  
 (3) (1908) 147 N. C. 11 ; 60 S. E. 643.

## APPELLATE CIVIL.

*Before Justice Sir Cecil Brett and Mr. Justice Chapman.*

AMRITA LAL BAGCHI

1912

v.

July 11

JOGENDRA LAL CHOWDHURY.\*

*Limitation—Suit by an auction-purchaser to recover the purchase-money from a person who attached money, in deposit in Court, as representing the surplus sale-proceeds belonging to the judgment-debtor—Limitation Act (XV of 1877), Sch. II, Art. 120.*

Limitation applicable to a suit brought by an auction-purchaser to recover a certain sum of money from one who had, after the sale and the deposit of money in Court, attached that sum in execution of his decree against the judgment-debtor, as representing the surplus sale-proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree-holder, is that provided by Art. 120, Sch. II of the Limitation Act (XV of 1877).

*Nilakanta v. Imam Sahib* (1) relied on.

*Hanuman Kamat v. Hanuman Mandur* (2) and *Rām Kumar Shaha v. Ram Gaur Shaha* (3) distinguished.

SECOND APPEAL by the defendant No. 1, Amrita Lal Bagchi.

One Amrita Lal Banerjee, in execution of a decree obtained in the First Munsiff's Court at Baruipore against defendant No. 3, put up  $\frac{3}{4}$  share of the Sunderbuns Lot No. 28 to sale, and on the 8th February 1899 the plaintiff purchased the property for Rs. 2,100.

The defendant No. 3 applied to set aside the sale under section 311 of the Code of Civil Procedure, and

\* Appeal from Appellate Decree, No. 1594 of 1909, against the decree of F. R. Roe, District Judge of 24-Parganas, dated June 1, 1909, modifying the decree of Aghore Chunder Hazra, Subordinate Judge of 24-Parganas, dated Feb. 15, 1909.

(1) (1892) I. L. R. 16 Mad. 361. (2) (1891) I. L. R. 19 Calc. 123.

(3) (1909) I. L. R. 37 Calc. 67.

1912  
 AMRITA LAL  
 BAGCHI  
 v.  
 JOGENDRA  
 LAL CHOW-  
 DHURY.

his application was rejected on the 20th September 1901. On appeal, the sale was set aside by the Additional Subordinate Judge of 24-Parganas on the 23rd May 1902. A second appeal to the High Court was dismissed on the 3rd August 1903. In the meantime defendant No. 1, in execution of a decree obtained against defendant No. 3, attached the money deposited by the plaintiff, as representing the surplus sale-proceeds belonging to the original judgment-debtor, and withdrew Rs. 1,600 on the 22nd August 1899. The plaintiff made an application under section 315 of the Code of Civil Procedure, which having been rejected, the present suit was brought by him on the 21st May 1908 for the refund of the purchase-money deposited in Court.

The defendant No. 1 pleaded, *inter alia*, that the plaintiff was the *benamidar* of Babu Giridhari Lal Roy, and that the suit was barred by limitation.

The Court of first instance held that Article 120, Schedule II of the Limitation Act, was applicable to the case, and that inasmuch as the suit was brought within 6 years from the date when the sale was set aside, it decreed the plaintiff's suit. On appeal, the learned District Judge of 24-Parganas affirmed the decision of the first Court. Against that decision the defendant No. 1 appealed to the High Court.

*Babu Ram Chunder Mazumdar (Babu Jogendra Nath Ghose and Babu Bejoy Kumar Bhattacharyya with him)*, for the appellant. The case is governed by either Article 62 or 97 of Schedule II of the Limitation Act. If the whole transaction is void from the beginning, then Article 62 would apply; if voidable, then Article 97 would apply: see *Hanuman Kamat v. Hanuman Mandur*(1). The learned Judge relied on the case of *Nilakanta v. Imam Sahib* (2), but in that case

(1) (1891) I. L. R. 19 Cal. 123; (2) (1892) I. L. R. 16 Mad. 361.  
 L. R. 18 I. A. 158.

Article 97 was not referred to at all. Article 97 would apply also in the case of an execution sale: see *Ram Kumar Shaha v. Ram Gour Shaha* (1). Article 62 applies in cases where Article 97 does not apply. That being so, Article 120 does not apply and the suit is barred by limitation. The plaintiff's application under s. 315 of the Civil Procedure Code having been rejected, no separate suit lies.

1912  
AMRITA LAL  
BAGCHI  
v.  
JOGENDRA  
LAL CHOW-  
DHURY.

*Babu Harendra Narain Mitter* (*Babu Satis Chunder Bhattacharjee* with him), for the respondent. Article 120 applies. The case of *Nilakanta v. Imam Sahib* (2) supports my contention. The case of *Hanuman Kamat v. Hanuman Mandur* (3) was between two contracting parties. A suit does lie for the refund of the purchase-money, and remedy provided for in s. 315 of the Code of Civil Procedure is not the only remedy: *Hari Doyal Singh Roy v. Sheikh Samsuddin* (4).

*Babu Ram Chunder Mazumdar*, in reply.

BRETT AND CHAPMAN JJ. The only question which has been raised in support of this appeal is whether the District Judge was correct in the view which he took that the limitation applicable to the present suit was that provided by Article 120 of the second Schedule of the old Limitation Act, that is to say, six years. The suit was brought by the auction-purchaser to recover the sum of Rs. 1,600 from the defendant No. 1 who had, after the sale and the deposit of the money in Court, attached that sum in execution of his decree against the judgment-debtor as representing the surplus sale-proceeds belonging to the original judgment-debtor after satisfaction of the decree

(1) (1909) I. L. R. 37 Calc. 67 ; (3) (1891) I. L. R. 19 Calc. 123 ;  
13 C. W. N. 1080. L. R. 18 I. A. 158.

(2) (1892) I. L. R. 16 Mad. 361. (4) (1900) 5. C. W. N. 240.

1912  
 AMRITA LAL  
 BAGCHI  
 v.  
 JOGENDRA  
 LAL CHOW  
 DHURY.

obtained against the debtor by the decree-holder. There can, in our opinion, be no doubt that the present plaintiff would be entitled to recover the money from the present appellant, who was the defendant No. 1 in the lower Courts, either by an application made under Order XXI, rule 93, Civil Procedure Code, or as he has done in the present case by a suit. For the purposes of the suit it would be necessary for him to make parties to it the judgment-debtor and the decree-holder.

In support of the present appeal, it has been argued that the proper Article of Limitation applicable to the present suit is Article 97 of Sch. II of the old Limitation Act. In support of this view the decision of the Privy Council in the case of *Hanuman Kamat v. Hanuman Mandur* (1) has been relied on, as also the case of *Ram Kumar Shaha v. Ram Gour Shaha* (2). Both of these cases are, in our opinion, distinguishable from the present case. The former is a case in which a member of a joint family attempted to sell certain properties, and his other co-sharers objected. The purchasers then sued for the return of the purchase-money, and their Lordships of the Privy Council held that the case must fall either under Art. 62 or Article 97 of Schedule II of the Limitation Act. That, however, was a suit between the original contracting parties to the sale, whereas in the present case it is impossible to contend that the person whose property was sold was in fact a willing party to the transaction, or that the present suit is one between the two original contracting parties. In fact the sale was brought about at the instance of the decree-holder, and the property sold was the property of the judgment-debtor, and the present suit is brought against a

(1) (1891) I. L. R. 19 Calc. 123 ;      (2) (1909) I. L. R. 37 Calc. 67 ;  
 L. R. 18 I. A. 158.,      13 C. W. N. 1080.



third person who attached some of the sale-proceeds as being the property of the judgment-debtor. This certainly cannot be regarded as a suit between the two contracting parties to the sale. In the same way in the case of *Ram Kumar Shaha v. Ram Gour Shaha* (1) the decree-holder had sold as the property of his debtor property which belonged to a third person, and, in that case, it was held that a suit would lie by the purchaser against the original decree-holder, and that the limitation applicable would be that provided by Article 62 of the second Schedule of the Limitation Act. In our opinion both these two Articles contemplate a suit brought by one of the contracting parties against the other to recover the money which has been paid at the sale, which owing to the default on the part of the vendor has become infructuous. The present case is not, however, of the same nature at all: and we think that the District Judge was quite right in holding that it did not fall within the provisions of either Article 62 or Article 97 of Schedule II of the Limitation Act. The learned Judge has relied on a case of the Madras High Court: *Nilakanta v. Imam Sahib* (2). That decision appears to be applicable to the facts of the present case, and, agreeing with it, we hold that the only limitation applicable to the present suit must be that provided by Article 120 of Schedule II of the old Limitation Act. As the present suit was instituted within six years from the date when the sale was declared by this Court to be invalid, we think that the learned Judge was quite right in holding that the suit was not barred by limitation. No other points have been taken in support of the appeal. The appeal fails and is dismissed with costs.

1912

AMRITA LAI  
BAGCHI  
v.  
JOGENDRA  
LAI CHOW-  
DHURY.

*Appeal dismissed.*

(1) (1909) I. L. R. 37 Calc. 67; (2) (1893) I. L. R. 16. Mad. 361.  
13 C. W. N. 1080.

## ORIGINAL CIVIL.

*Before Mr. Justice Chaudhuri.*

1912

July 16.

## ADMINISTRATOR GENERAL OF BENGAL

v.

HUGHES.\*

*Will—Republication—Succession Act (X of 1865) ss. 105, 159—Codicil—Death of Testator within one year—Repair of graves—Charitable bequest—Conditions: Election of deacons, Communion Service—Gift-over to another Charity—Perpetuities.*

The testator died on the 8th July 1909 leaving as next-of-kin a nephew and leaving a will dated the 14th April 1884 and four codicils. The testamentary dispositions included certain charitable and religious bequests. The last two codicils dated the 15th December 1906 and the 19th December 1908 respectively, were not deposited according to the provisions of section 105 of the Succession Act; they did not however purport to revoke the will, but in effect republished the will:—

*Held*, that, in the circumstances, the will as modified by the codicils was operative.

*Hopwood v. Hopwood*(1), *In re Moore. Long v. Moore*(2), referred to.

A direction that the will shall not have any effect (beyond proving the same) for at least two years from the arrival of the news of the testator's death, operated merely as a postponing clause, and did not invalidate the will.

A direction to trustees to look after and keep in proper repairs certain graves and to pay for the expenses of such repairs in perpetuity out of the estate, was not for charitable uses and was void and inoperative.

*Hoare v. Osborne*(3), *Mellick v. The President and Guardians of the Asylum*(4) *In re Vaughan. Vaughan v. Thomas*(5). *In re Rogerson. Bird v. Lee*(6) referred to. *In re Tyler. Tyler v. Tyler*(7) distinguished.

\* Original Civil Suit No. 172 of 1911.

(1) (1859) 7 H. L. Cas. 728, 740.

(4) (1821) Jac. 180.

(2) [1907] 1 Ir. Rep. 315.

(5) (1886) L. R. 33 Ch. D. 187.

(3) (1866) L. R. 1 Eq. 585.

(6) [1901] 1 Ch. 715.

(7) [1891] 3 Ch. 252.

A bequest in favour of the Lower Circular Road Baptist Church was subject to, *inter alia*, the following conditions : (a) that no ordained minister or missionary be ever elected as a deacon of the Church, or be allowed to canvass for votes, (b) that at Communion, two cups one of fermented, one of unfermented wine should be provided, (c) that the deacons do not introduce any innovation into the practice of the Church. In the event of the non-fulfilment of the conditions, there was a gift over in favour of the Howrah Baptist Church and other charitable and religious institutions :—

*Held*, that there was nothing illegal or impossible in the conditions, and inasmuch as the conditions had not been fulfilled, the gift-over came into operation.

*In re Robinson. Wright v. Tugwell*(1) distinguished.

An immediate gift to a charity for charitable uses, with a gift-over on an event which may be beyond the ordinary limit of perpetuities to another charity, is not invalid.

*Christ's Hospital v. Grainger*(2), *In re Tyler. Tyler v. Tyler*(3) followed. *In re Bowen, Lloyd Phillips v. Davis*(4), *In re Stratheden and Camobell*(5), *Chamberlayne v. Brockett*(6) distinguished.

#### ORIGINAL SUIT.

Henry Wilkin Jones, a doctor of medicine, having a British Indian domicile, died in Calcutta on the 8th July 1909 leaving a will dated the 14th April 1884 with four codicils thereto dated respectively, the 22nd May 1901, the 2nd March 1903, the 15th December 1906 and the 19th December 1908. The will and the first and second codicils were deposited with the Registrar of Assurances at Calcutta under section 105 of the Indian Succession Act of 1865, within the respective periods prescribed for the purpose. The third codicil was registered under the Indian Registration Act of 1877, but was not deposited under section 105 of the Indian Succession Act, and the fourth codicil was neither registered, nor deposited.

(1) [1892] 1 Ch. 95.

(2) (1849) 1 Mac. & G. 460.

(3) [1891] 3 Ch. 252.

(4) [1893] 2 Ch. 491.

(5) [1894] 3 Ch. 265.

(6) (1872) L. R. 8 Ch. App. 206, 211.

1912

ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
v.  
HUGHES.

1912  
ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
v.  
HUGHES.

The provisions of the will and the codicils, so far as they are material, are set out in the following extract from the judgment of CHAUDHURI J.:—

“The Administrator-General of Bengal was appointed by the first clause of the will as executor and trustee. This clause was revoked by the second codicil and he was reappointed by the third.

By the 2nd, 3rd and 4th paragraphs of the will certain specific legacies were given, but the bequests in paragraph 2 failed, as the wife of the testator, who was the legatee predeceased him on the 25th July 1907.

The third and fourth bequests were revoked by the first clause of the codicil No. 1.

By the 5th clause of the will the testator defines what he calls his residuary trust funds which he bequeathed unto and to the use of the Administrator-General as his trustee upon certain trusts which the testator classed under two heads one set during the lifetime of his wife and the other upon her death.

Under the first head he gave his wife Rs. 150 per month and Rs. 50 to Miss Eliza Humphreys, and Miss Anne Humphreys. In the event of Eliza Humphreys dying in the lifetime of his wife (whether in the testator's lifetime or after his death) to pay during the lifetime of his wife the sum of Rs. 50 to Miss Anne Humphreys. In the event of Miss Anne Humphreys also dying in the lifetime of his wife (whether in his lifetime or after his death) to pay Rs. 50 to one Charles Ledlie. In the event of the death of Charles Ledlie in the lifetime of his wife the said sum was to be paid to his wife, and then out of the balance of the income of the residuary trust funds, the trustee was to pay Rs. 30 a month to certain persons named in the 11th clause, and in the event of there being any balance left of the income of the residuary trust funds, then such balance was to be paid to the wife. In the event, however, of the persons named in the 11th clause of the will dying in the lifetime of his wife the whole of the balance was to go to his wife.

Under the second head the trustee was directed on the death of his wife to pay out of such residuary trust funds four legacies, and after paying them the trustee was directed in further trust to divide the income of the residuary trust funds into as many parts as would form the sum total of the shares of the persons named in the 15th clause of the will, or of the survivor or survivors of them, and to pay quarterly such part of the said income as would form his or her proportion of the said sum total of the said shares, which were to be as follows:—Three equal shares to Miss Eliza Humphreys for life, two equal shares to Thomas Charles Ledlie, one equal share to Anne Humphreys, one to Helen Ledlie, one to Constance Boyce, one

to Thomas Richard Jones and one equal share to the deacons for the time being of the Lower Circular Road Baptist Church for the Poor's Fund connected with such church.

In the 16th clause of the will the testator provides that if and so often as any or either of the above-mentioned persons shall die then as well his or her original share of the said income of the residuary trust funds, as also any share or shares shall have survived or accrued to her or him shall be divided amongst the others of them in such number of shares as shall make the sum total of the shares allotted to the said legatees who may survive (including the said deacons).

Then the trustee is directed to sell and convert into money all his real property and to invest the same in the Securities of the Government of India for the sum of Rs. 30,000 if the trust funds shall amount to so much, or exceed that sum, but not otherwise, and if the trust funds shall not amount to so much, then to hold the whole thereof upon trust to pay the income thereof quarterly to two of the deacons for the time being of the Lower Circular Road Baptist Church to be by them applied in manner following, namely as to a moiety thereof for the Poor Fund in connection with the said church for the sustenance and support of the poor belonging to the said church or the congregation usually worshipping in the Baptist Chapel, and as to the other moiety for the general funds in connection with the said Chapel for the following purposes viz :—the support of the pastor for the time being, the expenses of religious services held in the said Chapel, repairs to the Chapel, the pastor's dwelling-house and out-offices connected therewith and also for keeping the testator's grave in decent order which was to be a duty imperatively incumbent on the deacons for the time being of the said Church to perform.

Clause 18 of the will provides that if the trust estate after setting apart Securities of the Government of India for Rs. 30,000 as above mentioned sufficed for this purpose, but not otherwise the trustee out of the trust estate was to set apart and hold Securities of the Government of India for Rs. 8,000 or such other sum not exceeding the sum of Rs. 8,000 as might comprise the balance of the said trust estate upon trust to pay the interest thereof half-yearly to the governors of the Free School for the education and maintenance of one or two European or Eurasian children.

Clause 19 of the will provides that if the trust funds exceeded the sum of Rs. 38,000, then all the balance thereof was to be applied as directed in the 17th clause namely for the use and benefit of the Poor Fund and the general fund of the Lower Circular Road Baptist Church. It is unnecessary to refer to the other clauses of the will.

By the 1st codicil clause I paragraphs 3, 4, 6, 7, 8, 9, 10, 12, 13, 15 and 16 of the will were revoked and the Testator directed by the 3rd clause that

1912  
ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
v.  
HUGHES.

1912  
 ADMINIS-  
 TRATOR  
 GENERAL  
 OF BENGAL  
 ".  
 HUGHES.

the income of the residuary trust funds was to be divided into two equal parts, one part being paid to his wife and the other half was to be paid to certain annuitants named in clauses 5 to 9 and the balance to the deacons (not being missionaries of the said Circular Road Baptist Church) to be applied by them in manner mentioned in paragraph 17 of his will.

There was a proviso that in the event of the death of any of the annuitants the amounts payable to each was to be paid over to the deacons (not being missionaries) of the Lower Circular Road Baptist Chapel to be applied by them as aforesaid.

By the 12th paragraph of this codicil the testator directed that his will was to have no effect given to it (beyond the same being proved) for at least two years from the arrival of the news of his death except that if his wife should be then living she was to be paid Rs. 300 a month, and Rs. 50 each to the Humphreys.

The rest of this codicil is unnecessary to refer to except the 18th paragraph in which he stated his reason for providing against money being paid to missionaries as he had no confidence in them as business men and the 19th paragraph in which he provided that not more than Rs. 20 was to be paid to any one person from the Poor Fund and that Rs. 500 only was to be spent on quadrennial repairs of the Baptist Chapel.

This codicil finally confirmed his will and is stated to be intended to be auxiliary, explanatory and supplementary thereto.

By the second codicil the testator made certain changes in the bequests modifying the gift to the Baptist Church.

As the main contention in this case is with regard to these modifications, I quote the clauses relating thereto at length.

Clause 7. "I direct that the provision made in my said will and codicil in favour of the Baptist Church worshipping in the Lower Circular Baptist Chapel shall be subject to the following further conditions.

(a) "That no ordained minister of the Gospel or missionary or member of the Baptist Missionary Society be ever elected as a deacon of the said Church or be allowed to canvass for votes to secure his election as a deacon of the said Church.

(b) "That at each of the Communion Services commonly called the Lord's Supper celebrated in the said chapel or elsewhere there shall be two cups used—one of alcoholic or fermented wine and one of unfermented wine—and each person communicating shall be permitted to partake of whichever cup he or she pleases without having his conscience over-ridden.

(c) "That the said deacons do not introduce any innovation into the practice of the said church but adhere to the old practices which have always been observed in Baptist Open Communion Churches.

(d) "That before any money is paid by my executors or trustees quarterly to deacons for the time being of the said church there shall be given to the said executors or trustees every quarter a certificate signed by the pastor and two of the lay deacons testifying that the conditions of this and of the other codicil and of my will have been carefully conscientiously and strictly observed.

Clause 8. "I further direct that should the conditions laid down in the last clause hereof or in the previous codicil or in my said will be broken or in anywise infringed then and in that case one half of the interest dividends etc. that I have set aside for the said Lower Circular Road Baptist Church shall be made over and paid to the pastor for the time being of the Howrah Baptist Church for the benefit of the said church generally and the other half thereof to the Reverend Arthur Jewson's Faith Orphanage at present of No. 117 Dhurruntollah Street (if then existing) or if not in existence to the pastor of the Lall Bazar Baptist Church for the benefit of the said church and of the poor of the church."

The third codicil made certain changes in the bequests not necessary to refer to, and by the third clause the testator directed that the pastor and deacons of the Lower Circular Road Baptist Church should look after and keep in proper repair the grave or graves of himself, his wife and child wherever such grave or graves might happen to be, and they should furnish a quarterly certificate signed by the pastor and two of the lay deacons testifying that they had done so and that the said grave or graves was or were in good repairs and the testator revoked the 17th clause of the 1st codicil, which directed the trustee to look after and keep the graves in proper repairs.

The fourth codicil directs that the Humphreys were to be allowed to reside in any flat of his house free of rent and taxes, and he revoked the legacy to the Calcutta Free School, and increased the allowance to the Humphreys from Rs. 50 a month to Rs. 100 a month."

The testator left a considerable estate consisting mainly of stocks and shares, but including the house and premises No. 49 Free School Street, in Calcutta. The Administrator General of Bengal obtained probate of the will and four codicils on the 5th December 1909, and instituted this suit on the 17th February 1911 for construction of the will and codicils. The Reverend George Hughes, pastor, and David Hooper and Wallace Carter, deacons, as representing the Lower Circular Road Baptist Church, the Reverend Bowen

1912

ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
v.  
HUGHES.

1912  
ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
v.  
HUGHES.

James, pastor, as representing the Howrah Baptist Church, the Reverend George Henry Hook, pastor, as representing the Lall Bazar Baptist Church, and Thomas Gill Jones, the next-of-kin, were made defendants in the suit. The questions which the Administrator General submitted to judgment were the following:—

(i) As to the effects and consequences of the 3rd and 4th codicils not having been deposited as prescribed by section 105 of the Indian Succession Act and of the 4th codicil having been executed less than twelve months before the death of the Testator,

(ii) As to the true and proper construction and effect of the direction in the 12th paragraph of the 1st codicil that the will shall not have any effect (beyond proving the same) for at least two years from the arrival of the news of the testator's death save and except as in the said paragraph mentioned.

(iii) Whether the expression "said trust funds" in the 17th and 19th clauses of the will means and applies only to the sale proceeds of the testator's real property by the 17th clause directed to be sold and the investments thereof or whether it means and refers to the "residuary trust funds" mentioned and referred to in the 5th and subsequent clauses of the will?

(iv) What do the requests to or for the benefit of the Circular Road Baptist Church contained in the will and codicils comprise—the whole residuary trust funds (subject to the payments directed thereout), or only the sale proceeds of real property referred to in the 17th clause of the will, or what else?

(v) As to the validity, effect, and operation of the conditions mentioned in the 7th clause of the 2nd codicil and purporting to be attached to the provision made by the testator in favour of the Circular Road Baptist Church.



(vi) What in the event of the provision in favour of the Circular Road Baptist Church being validly forfeited for breach and infringement of the conditions, would be the destination of the funds that had been applicable for such provision? Would in such case the gift over contained in the 8th clause of the 2nd codicil take effect or would there be an intestacy as to such funds, or what otherwise would be the effect or result of such forfeiture?

(vii) Who during the lifetime of Eliza Humphreys is entitled to the surplus income of the residuary trust funds beyond what is required for payment of her annuity of Rs. 100 a month? Is there an intestacy as to such surplus income or any part of it during the life of Eliza Humphreys and if so how during such period is such surplus income applicable?

(viii) May the plaintiff properly pay the pecuniary legacies during the period referred to in the 12th clause of the 1st codicil of two years from the arrival of the news of the testator's death?

(ix) As to the validity and effect and operation of the directions given by the testator concerning the repairs of the grave or graves of himself and his wife and child. And in particular whether any of the directions are or is to be regarded as conditions or condition precedent to the bequests or bequest to or for the benefit of the Circular Road Baptist Church and in such case as to the effect of such conditions or condition upon such bequests or bequest and upon the alternative or substitutionary bequests to or for the benefit of the Howrah Baptist Church and Lall Bazar Baptist Church respectively.

(x) As to the meaning operation and effect of the directions contained in the 19th clause of the 1st codicil that not more than Rs. 20 shall be paid to any one person from the Poor Fund (of the Circular

1912

ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
v  
HUGHES.

1912  
 ADMINIS-  
 TRATOR  
 GENERAL OF  
 BENGAL  
 v.  
 HUGHES.

Road Baptist Church) and that Rs. 500 only shall be spent on the quadrennial repairs of the Church.

(xi) Who during the lifetime of Eliza Humphreys is entitled to the rent if any that may be received for the premises No. 49 Free School Street?

After payment of the funeral and testamentary expenses, the testator's estate was of the approximate value of Rs. 3,30,166.

With reference to the 7th clause of the second codicil it is to be observed, that the former practice at the Circular Road Baptist Church, was to have for the purposes of Communion, two cups one of fermented wine and the other of unfermented wine. Previous to the testator's death however the Church departed from the old practice and used only unfermented wine. The testator resented this alteration, and did not from that time attend the Communion services at the Church. The testator also held a strong opinion that no minister or missionary should be elected as deacon of the Church. Up to the date of hearing of the suit, the Church had not complied with any of conditions of the 7th clause, and it did not appear that it was then in a position to do so.

The Reverend Arthur Jewson's Faith Orphanage referred to in the 8th clause of the second codicil had ceased to exist some time prior to the death of the testator.

*Mr. J. E. Bagram* (with him *Mr. Langford James*), for the Administrator General of Bengal, placed the conflicting contentions of the defendants before the Court and submitted that the expression "said trust funds" in the 19th clause of the will referred to the "residuary trust funds" of the 5th clause, and included the whole of the residue. The following authorities

were cited: *Camberlayne v. Brockett* (1), *Re Hyde. Ward v. Little* (2), *In re Waring. Hayward v. Attorney General* (3), *In re White's Trusts* (4), *In re Bowen. Lloyd Phillips v. Davis* (5), *Hunter v. Attorney General* (6), *Mayor of Lyons v. Advocate General of Bengal* (7), *In re Tyler. Tyler v. Tyler* (8), *Christ's Hospital v. Grainger* (9).

1912  
ADMINIS-  
TRATOR  
GENERAL OF  
BENGAL  
v.  
HUGHES.

*Mr. S. P. Sinha* (with him *Mr. Zorab* and *Mr. S. R. Das*), for the Lower Circular Road Baptist Church, raised the following main contentions on the questions submitted:—(i) Republication by a codicil does not defeat the intention of the will: *Long v. Moore* (10); (ii) the clause operated only as a postponing clause, and effected no curtailment of the benefits; the testator purported merely to extend the usual executor's year; (iii), (iv) the whole of the residuary trust funds, real and personal, was meant; (v), (vi) the provisions of the 7th clause of the 2nd codicil do not operate to deprive the Lower Circular Road Church of their benefit and hence no question of forfeiture arises—the conditions are merely conditions subsequent, or continuing legacies and the Court will give the Lower Circular Road Baptist Church an opportunity of complying with them: see *Tudor on Charities* page 202, and *Attorney General v. Boulton* (11); moreover, the testator has allowed two years during which the conditions may be fulfilled and the two years had not expired at the time of the institution of the suit; (vii) there is no question of intestacy, as the income is wholly disposed of; (ix) the directions

(1) (1872) L. R. 8 Ch. App. 206.

(2) (1898) 79 L. T. 261.

(3) [1907] 1 Ch. 166.

(4) (1886) L. R. 33 Ch. D. 449.

(5) [1893] 2 Ch. 491.

(6) [1899] A. C. 309.

(7) (1876) L. R. 1 A. C. 91;

I. L. R. 1 Calc. 303.

(8) [1891] 3 Ch. 252.

(9) (1849) 1 Mac. & G. 460.

(10) (1907) 1 Ir. Rep. 315.

(11) (1794) 2 Ves. Jun. 380, 386.

1912  
ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
v.  
HUGHES.

have no binding operation, and are not conditions precedent to the bequests, nor conditions attached to the bequests.

*Mr. Pearson* (with him *Mr. Sircar*), for the Howrah Baptist Church, supported *Mr. Sinha's* argument on questions (i), (ii), (iii), (iv) and (vii). As regards (v) and (vi) the conditions were good and valid and not impossible and must be complied with to enable the Lower Circular Road Baptist Church to benefit under the instruments. The latter Church has done nothing to comply with the conditions, and the gift over in favour of the Howrah Baptist Church comes into operation.

*Mr. Avetoom* (with him *Mr. C. E. Bagram*), for the Lall Bazar Baptist Church, supported *Mr. Pearson's* argument, as regards the validity and operation of the conditions: *In re Robinson* (1), *In re Tyler*. *Tyler v. Tyler* (2).

*Mr. Pugh* (with him *Mr. Cubitt*), for the next-of-kin, made the following submissions on the questions: (i) the will and the codicils must be all read together, with the result that the whole testamentary disposition is bad and invalid as the republication is clearly bad under section 105 of the Succession Act: see *Theobald on Wills*, 6th edition, p. 145: (ii) the effect of this clause is to produce an intestacy: as regards (iii), (iv) and (vii) the "said trust funds" include only the sale proceeds of the realty, and the personalty, is undisposed of; it is submitted that there is a complete intestacy, as nowhere is the corpus disposed of. The gift over to the Howrah Baptist Church and the other charities on the non-fulfilment of conditions by the Lower Circular Road Church must fail, as it may not operate within perpetuity.

(1) [1892] 1 Ch. 95.

(2) [1891] 3 Ch. 252.

limits : *In re Lord Stratheden and Campbell* (1), *In re Bowen. Lloyd Phillips v. Davis* (2), *In re Randell. Randell v. Dixon* (3).

*Cur. adv. vult.*

1912  
ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
v.  
HUGHES.

CHAUDHURI J. This is a suit instituted by the Administrator General of Bengal for the construction of the will of Dr. Henry Wilkin Jones, who died on the 8th July 1909 after having made and published his will, dated the 14th April 1884 and four codicils dated the 22nd May 1901, 2nd March 1903, 15th December 1906 and 19th December 1908. The will and the first and second codicils were deposited according to the provisions of section 105, Succession Act. The third codicil was registered, but was not deposited. The fourth codicil was neither registered nor deposited.

It is contended by the next-of-kin of the testator Thomas Gill Jones that in so far as the fourth codicil was not executed twelve months before the testator's death and deposited within six months in some place provided by law for the safe custody of wills, according to the provisions of section 105 Succession Act, the will and codicils are entirely inoperative, inasmuch as the will must be taken to have been made on the date of the last codicil. In support of this contention Theobald on Wills, 6th edition page 145 has been quoted, but see Jarman on Wills 6th edition Vol. I. page 206. It is not correct to say that a codicil always operates as if the will was made at the date of the codicil. The codicil, unless it expressly revokes an earlier will or codicil, does not prevent its operation. I am supported in this view by the decision of Lord Campbell in *Hopwood v. Hopwood* (4). 7 and 8 Vic.

(1) [1894] 3 Ch. 265.

(3) (1888) L. R. 38 Ch. D 213.

(2) [1893] 2 Ch. 491.

(4) (1859) 7 H. L. Cas. 728, 740.

1912  
 ADMINIS-  
 TRATOR  
 GENERAL  
 OF BENGAL  
 v.  
 HUGHES.  
 CHAUDHURI  
 J.

c. 97 section 16 corresponds with section 105 of the Succession Act. In considering the English Statute, Barton J. has held that a charitable gift is not invalidated merely by the fact that the will containing it, is confirmed and republished by a codicil made less than three months before the testator's death: *In re Moore. Long v. Moore* (1). In that case the effect of the codicil was *pro tanto* to reduce and postpone the charitable gift made in the original will. In this case the fourth codicil is expressly stated as intended to be auxiliary, explanatory and supplementary to the will which was executed on the 14th April 1884, and merely provided for the residence of certain persons therein named, increasing their allowance, after revoking certain legacies, with a direction that the executor was to see that a proper monument was erected for the graves of the testator and of his wife. I am of opinion that the republication of a will does not in all circumstances erase the old date, and certainly did not do so in this particular case. I hold that the will under consideration, as modified by the codicils, is operative.

The parties to the suit are the Lower Circular Road Baptist Church, the Howrah Baptist Church, the Lall Bazar Baptist Church and the next-of-kin above named. To understand the contentions raised by them it is necessary to state shortly the scheme of the original will and the modifications made by the codicils.

[His Lordship proceeded to refer to the clauses of the will and codicils set out above and continued:]

Of the pecuniary legacies and annuities bequeathed by the testator other than the bequest or bequests to the Lower Circular Road Baptist Church and the alternative bequests to the Howrah Baptist Church,

(1) [1907] 1 Ir. Rep. 315.

the Faith Orphanage and the Lall Bazar Church such of them as remain payable, the others having been revoked by one or other of the codicils or having lapsed by the death of the donees in the lifetime of the Testator, are set out in the 23rd paragraph of the plaint.

The annuity of Rs. 100 a month given to Anne Humphreys was paid to her during her lifetime and the arrears which remained payable at her death have since been paid to her administrator.

The Administrator General of Bengal has set apart sufficient funds to answer the annuities of Rs. 100 a month to Eliza Humphreys and Rs. 4 a month to Imam Bux and also the pecuniary legacies given by clause 14 of the will, particulars of which appear in Schedule F annexed to the plaint.

Eliza Humphreys is now the last survivor of the three persons named in the 17th clause of the will, as altered by the 20th paragraph of the first codicil. She is now the only person upon whose death the directions contained in the 17th clause of the will as altered by the first codicil will come into operation. She is residing in the upper flat of the testator's house No. 49 Free School Street, the lower flat of which has been leased to a tenant by the Administrator General.

The debts and funeral and testamentary expenses have been paid and the testator's estate in the hands of the Administrator General at the time the plaint was filed was of the approximate value of Rs. 3,30,166.

There are no facts in dispute in this suit and an affidavit has been put in by consent of parties containing the particulars.

Various questions, however, have arisen as to the true construction of the will and codicils, and the Administrator General has set them out in the 32nd

1912  
ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
v.  
HUGHES.

CHAUDHURI  
J.

1912  
 ADMINIS-  
 TRATOR  
 GENERAL  
 OF BENGAL  
 v.  
 HUGHES.  
 CHAUDHURI  
 J.

paragraph of the plaint. It will be convenient to deal with them in the order therein given.

(i) The first point is about the 3rd and 4th codicils not having been deposited, as prescribed by section 105 Succession Act. I have already dealt with it.

(ii) The second point is about the meaning of the direction in the 12th paragraph of the 1st codicil that the will is not to have any effect beyond the same being proved for at least two years from the arrival of the news of the testator's death, save and except the payment to his wife and the other persons therein named.

The next-of-kin contends in his written statement that the above is a direction to accumulate the income of the estate and is therefore void. I do not consider the contention sound. The words "that the will shall not have any effect" means that no payments are to be made except to the persons named in the clause for at least two years from the arrival of the news of the death of the testator, but does not prevent the accrual of the rights of the legatees and annuitants. He contended at the hearing that if it is not a direction to accumulate, at any rate the income for the said period remains undisposed of and he is therefore entitled to it. I do not consider this contention also to be correct. It is merely a postponement of the payments directed by the testator and has the effect of giving the executor or trustee two years instead of the statutory period of one year.

(iii) The expression "said trust funds" in the 17th and 19th clauses of the will, in my opinion refers to the "residuary trust funds" mentioned in the 5th and subsequent clauses of the Will.

(iv) In that view the "trust funds" mentioned in the 19th clause of the will far exceed the sum of Rs. 38,000. The words "trust funds" do not simply



mean the sale proceeds of the real property referred to in the 17th clause of the will, but comprise the whole residuary trust funds subject only to the payments directed to be made thereout. I also hold that the bequest to the Circular Road Baptist Church made in that clause is valid. The direction contained in it about keeping the grave in decent order, was modified by the 17th clause of the first codicil, which directed the trustee to look after and keep in proper repair the testator's grave and those of his wife and child paying the expenses of such repairs out of the estate.

The last direction was again altered by the 3rd clause of the 3rd codicil, which directed that the wife should order a monument to be erected over his remains or in the event of her death, Miss Anne Humphreys would please do so. The cost of the monument was to be paid by the executor and trustee out of the estate. He directed that the pastor and deacons of the Lower Circular Road Baptist Church were to look after and keep in proper repairs the grave or graves of himself his wife and child, and they were to furnish a quarterly certificate signed by the pastor, and two of the lay deacons of the said Church testifying that they had done so, and that the grave or graves was or were in good repair. He also directed the expense of such repairs to be paid out of the estate.

Now it has been held that a gift for building, maintaining or repairing a monument or tomb not forming part of the fabric or ornament of a church (whether as a memorial or burying place of the donor alone or of himself and his family) cannot be supported as charitable, though such may be valid as a private trust, if not in the nature of a perpetuity. Here the direction is to the trustee to pay for the repairs in perpetuity and I consider it accordingly void and inoperative.

1912

ADMINIS-  
TRATOR  
GENERAL  
OF BENGALv.  
HUGHES.CHAUDHURI  
J.

1912  
 ADMINIS-  
 TRATOR  
 GENERAL  
 OF BENGAL  
 v.  
 HUGHES.  
 ———  
 CHAUDHURI  
 J.

The authorities on the point are collected in the Laws of England, Vol. IV, page 118, paragraph 185, out of which the following may be referred to, viz:—  
*Hoare v. Osborne* (1), *Mellick v. The President and Guardians of the Asylum* (2), *in re Vaughan. Vaughan v. Thomas* (3), *In re Rogerson. Bird v. Lee* (4).

*In re Tyler. Tyler v. Tyler* (5) a perpetual condition in a gift to a charity for keeping a tomb in repairs was held valid when the bequest was in the following terms: "I give to the trustees for the time being of the London Missionary Society the sum of £42,000 Russian 5 per cent. stock, with a rent-charge to my brother Charles Tyler Esq. of £1,000 a year for life. Also I commit to their keeping of the keys of my family vault at Highgate Cemetery to the (*sic*) care and charge, my brothers to be buried in the vault if they wish, and to use the same, if they wish, for any member of the family, the same to be kept in good repair and name legible and to rebuild when it shall require: failing to comply with this request, the money left to go to the Blue Coat School, Newgate Street, London." Sterling J held the gift to be valid on the ground that such societies depended largely on the voluntary contributions of their supporters, and the funds required for keeping the family vault in repair might readily be obtained from persons willing to subscribe for the purpose of retaining the administration of the large fund given by the testator, without in the least trenching on any fund devoted to charitable purposes. The judgment was upheld by the Appeal Court, Lord Justice Fry holding that keeping a tomb in repair was not an illegal object, and there was no rule of law which said

(1) (1866) L. R. 1 Eq. 585.

(2) (1821) Jac. 180.

(3) (1886) L. R. 33 Ch. D. 187.

(4) [1901] 1 Ch. 715.

(5) [1891] 3 Ch. 252.

that you might not try to enforce a condition creating a perpetual inducement to do a thing which is lawful.

Here the directions are to the pastor and deacons of the Lower Circular Road Baptist Church to look after and keep the tomb in repairs, but that the expenses of the repairs are to be paid out of the estate by the trustee. It creates a perpetual obligation on the trustee and ties up property in his hands for an unlimited time. I hold under the circumstances there is no valid trust imposed in respect of the repairs of the graves. It is a perpetuity and not charity.

(v & vi). These two have to be taken together. The provisions in the will and the first codicil in favour of the Circular Road Baptist Church are made subject to four "further conditions" by the 7th clause of the second codicil, each of which I shall take separately. (a) "That no ordained minister of the Gospel or missionary or member of the Baptist Missionary Society be ever elected as deacon of the said Church or be allowed to canvass for votes to secure his election as a deacon of the said Church." How can the Baptist Chapel prevent people from canvassing for votes? It may be indirectly done by their having a rule that no such persons are eligible as deacons of the said Church. But the clause does not say so. It is quite clear that the testator had taken the view that missionaries were not capable business men, and he wanted to exclude them from becoming deacons of the said Church. It may be difficult to have such a rule, but it can scarcely be called an illegal or impossible one. So far as clauses (b) and (c) are concerned, there is nothing illegal in them. The testator directed fermented and unfermented wine to be kept at the Communion Service of the Chapel—and old practices to be observed. Clause (d) is merely a direction that no money is to be paid by the executors or trustees

1912  
ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
"HUGHES.  
CHAUDHURI  
J.

1912  
ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
v.  
HUGHES.  
CHAUDHURI  
J.

without a quarterly certificate by the pastor and two of the lay deacons testifying that the conditions of the will and codicil had been carefully, conscientiously and strictly observed. The Baptist Church has not so far complied with these conditions and they are not now in a position so to do. It is contended that if the conditions are operative they are not now entitled to receive any payment. It is urged on their behalf that the testator directed that no payments were to be made for a period of two years, and that they could not be asked to comply with the conditions until the time for payment arrived, and inasmuch as the plaint was filed before the expiration of the period, namely on the 17th February 1911, the matter being before the Court, they were not entitled to ask for payment, and therefore time ought to be given to them to comply with the conditions, if the Court could not modify them having regard to the fact that it was a charitable bequest. I do not think having regard to the alternative bequest made in favour of other charitable institutions, it is open to me to modify the conditions contained in the 7th clause. So far as the keeping of two cups, one of alcoholic or fermented wine, and other of unfermented wine is concerned, the Baptist Chapel formerly used to keep both, but have discontinued the practice. There is nothing illegal in the testator wanting the old practice to be revived. He knew that the Baptist Chapel had departed from their old practice, and if the Baptist Church choose to comply with the condition there is no difficulty in the matter. They had once altered their rules, and if they thought fit they might change them again. There is nothing improper or unlawful in the testator's direction that the old practices of the chapel were to be observed, and that innovations were not to be introduced. Clause (a) also could be given effect to by

interpreting the second portion of it, as meaning, that by their rules the Baptist Chapel were to declare missionaries or ordained ministers as ineligible for the office of deacons of the said Church. The Black Gown case, *In re Robinson*. *Wright v. Tugwell* (1) was quoted in support of the proposition that the Court could retain funds in Court until the charity intended to be benefited was in a position to comply with the conditions imposed. The distinction between that case and the present one is, that there is in this case a gift over to other charitable institutions, and I do not think I can keep the money in Court giving an indefinite time to the Lower Circular Road Baptist Church to comply with the conditions, if they desire to do so. Even now it is not said whether it will be possible for them to comply with the conditions. I think that the period of two years above referred to, was perhaps with the object of giving time to the Lower Circular Road Baptist Church time to revert to the old practice. I do not think the Court has power to give them further time to deliberate upon the matter. The gift-over to the other charities, I hold, is valid.

The orphanage has ceased to exist, and therefore one-half of the interests dividends etc. which had been set apart for the Lower Circular Road Baptist Church goes over to the Howrah Baptist Church, and the other half to the Lall Bazar Baptist Church.

The next-of-kin strenuously contended that the whole of the gift to the Baptist Church and other charities failed, the contention being that the gift over might not operate within perpetuity limits.

The contention is based upon *In re Bowen*. *Lloyd Phillips v. Davis* (2). In that case the testator had made an immediate disposition in favour of charity

1912  
 ADMINIS-  
 TRATOR  
 GENERAL  
 OF BENGAL  
 v.  
 HUGHES.  
 CHAUDHURI  
 J.

(1) [1892] 1 Ch. 95.

(2) [1893] 2 Ch. 491.

1912  
 ———  
 ADMINIS-  
 TRATOR  
 GENERAL  
 OF BENGAL  
 v.  
 HUGHES.  
 ———  
 CHAUDHURI  
 J.

in perpetuity, followed by a gift over of a future interest, to arise upon an event, which need not necessarily have occurred within perpetuity limits. It was held by Sterling J. that the gift over consequently failed, and it was said that the principle established by *Christ's Hospital v. Grainger* (1) and *In re Tyler* (2) had no application in like cases. I do not consider the contention in this case is supported by this decision. This is a case which falls within the rule laid down in *Christ's Hospital v. Grainger* (1) and *In re Tyler* (2). In both these cases it was held that a gift to a charity for charitable purposes, with a gift over, on an event which may be beyond the ordinary limit of perpetuities to another charity, is not illegal. The property vests in a charity and because the particular charity fails to comply with certain conditions, it goes over to another charity. In *In re Bowen. Lloyd Phillips v. Davis* (3) it was held that the principle established in *Christ's Hospital v. Grainger* (1) and in *In re Tyler* (2) had no application where (a) an immediate gift in favour of private individuals is followed by an executory gift in favour of charity, or where (b) an immediate gift in favour of charity is followed by an executory gift in favour of private individuals. This is not either of the two cases.

*In re Stratheden & Campbell* (4) was referred to, in support of the proposition that if the gift in trust for charity, is itself conditional upon a future and uncertain event, it is subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. It is quite true that if the condition is never fulfilled, the estate never arises, or if it is so remote and indefinite as to transgress the limits of time prescribed by the

(1) (1849) 1 Mac. & G. 460. (3) [1893] 2 Ch. 491.

(2) [1891] 3 Ch. 252. (4) [1894] 3 Ch. 265.

rules of law against perpetuities, the gift fails *ab initio*. This principle was enunciated by Lord Selborne in *Chamberlayne v. Brockett* (1); but in the present case I do not consider that there is any condition precedent which prevents the estate coming into existence. The vesting in this case is immediate, but the Lower Circular Road Baptist Chapel is divested, because certain conditions cannot be fulfilled by them.

(vii). I also hold there is no intestacy as to the surplus income or any part of it during the lifetime of Eliza Humphreys.

(viii). This question does not arise, Two years have already elapsed, and it is competent to the Administrator General to pay the pecuniary legacies now remaining unpaid.

(ix). I have already dealt with the question of the repairs to the graves.

(x). The direction in the 19th clause of the first codicil means that so far as the Poor Fund is concerned, no person is to be paid more than Rs. 20 out of the fund given by the testator. There is nothing improper in that direction or in the restriction as to the cost of the quadrennial repairs limiting it to Rs. 500.

(xi). The rent of the premises No. 49 Free School Street during the lifetime of Eliza Humphreys forms part of the residuary trust funds.

As these funds exceed the sum of Rs. 38,000 and the gift to the Free School has been revoked the balance enures to the benefit of the charities found entitled.

The only question now left is where the *corpus* ought to go. The testator merely devised the income, and there is no special provision about the *corpus*. The question does not however now arise. The Administrator General is in possession as executor and trustee and the question will arise upon the death of Miss Anne Humphreys.

1912  
ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
v.  
HUGHES.  
CHAUDHURI  
J.

1912  
ADMINIS-  
TRATOR  
GENERAL  
OF BENGAL  
v.  
HUGHES.  
—  
CHAUDHURI  
J.

Section 159 of the Succession Act provides that where the interest or produce of a fund is bequeathed to any person and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration the principal as well as interest shall belong to the legatee. This section although it speaks only of the interest or produce of a fund applies equally to immoveable property. See illustration (c) to the section. A gift of income without more, is a gift of the *corpus*, even though the gift is to the separate use or through the medium of a trust.

It is however contended by the Lower Circular Baptist Church that a different state of things will arise upon the death of Miss Anne Humphreys, and that they may then, if they comply with the conditions, get the whole estate. I am not prepared to say that their contention is correct, and in fact Mr. Sinha said that he could not support that contention, but I do not think it necessary now to determine this point. During the lifetime of Miss Anne Humphreys the Administrator General is to be in possession of the estate and he is to distribute the fund according to the terms of the will and codicils as construed in this case. Costs of all parties will come out of the estate. The costs of the parties except those of the next-of-kin will be as between attorney and client on scale 2. The costs of counsel appearing for the next-of-kin will be taxed on the basis of counsel of standing. All his other costs will be as between party and party on scale 2. Liberty is given to the parties to apply as and when necessary.

Attorneys for the plaintiff: *Leslie & Hinds.*

Attorneys for the defendants: *Morgan & Co.; Orr, Dignam & Co.; Rutter & Co.; Watkins & Co.*

J. C.



**MATRIMONIAL JURISDICTION.**

*Before Mr. Justice Fletcher.*

GIORDANO

*v.*

GIORDANO.\*

1912

July 22

*Divorce—Husband's petition—Foreign domicile—Divorce Act (IV of 1869)  
—Territorial jurisdiction.*

The husband, who was an Italian subject with an Italian domicile, instituted proceedings for divorce on the ground of his wife's adultery. The marriage had been solemnized in India, and the parties were residing in British India :

*Held*, that, under the provisions of the Indian Divorce Act, the Court was bound to grant a divorce on proof of adultery, although the divorce would have no effect outside India.

*Le Mesurier v. Le Mesurier* (1) and *Shaw v. Gould* (2) referred to.

**DIVORCE.**

This was a petition by the husband, Francesco Giordano, for the dissolution of his marriage on the ground of his wife's adultery with one Berto Alasia. The parties were married in Calcutta at the office of the Registrar of Marriages on the 22nd October 1908. The lady was described in the marriage certificate as a British born subject. Francesco Giordano was an Italian. Shortly after their marriage, the parties proceeded to Shillong, where they lived together as man and wife till about June or July 1909, when the wife returned to her mother's house, No. 2, Wellesley Second Lane, in Calcutta. The husband returned to Calcutta in October of the same year but the wife

\* Matrimonial Suit No. 7 of 1912

(1) [1895] A. C. 517.

(2) (1868) L. R. 3 E. & I. App. 55.

1912  
GIORDANO  
v.  
GIORDANO.

refused to have anything further to do with him. He continued living in Calcutta till February 1912, when he removed to Sealdah, where he was residing when the petition was filed.

Early in the year 1910, the wife removed to No. 19, Chowringhee Road, in Calcutta, and continued living there under the assumed name of Mrs. Thomson. It came to the knowledge of the petitioner that on the 26th October 1910 and on the 13th November 1911, respectively, two children were born to the respondent, and that their births were registered on the 20th February 1912 under the name of Thomson Thereupon, he instituted these proceedings. It was alleged by the petitioner that since his wife left Shillong, he had had no access to her, and he charged her with committing adultery with the co-respondent, claiming the sum of Rs. 5,000 from the co-respondent by way of damages.

It appears that the petitioner had been residing in Calcutta for a period of eight or nine years, had been twice married here and had been enrolled as a volunteer. At the date of his petition, he was a travelling ticket-inspector in the service of the Eastern Bengal State Railway.

No answer was filed either by the respondent or co-respondent, and the suit came on as an undefended cause, on the 15th July 1912, before Fletcher J. In reply to a question put by his Lordship, the petitioner stated that he had no intention at present of returning to Italy. The case stood over for argument as to whether the Court had jurisdiction to grant a divorce.

*Mr. J. N. Banerjee*, for the petitioner. Although the petitioner's domicile of origin may have been Italian, he has acquired an Indian domicile by his long residence here and his course of conduct. Petitioner's

evidence was that he had no present intention of returning to Italy. It is not necessary that a man should abandon all hope of returning: *In re Craignish* (1). The jurisdiction which the Divorce Act confers on the Court is territorial: it would be straining the phraseology and scope of the Act to read "residence" as meaning "domicile." It is clear from section 2 that, so far as British India is concerned, the Act is not limited to British subjects only.

1912  
GIORDANO  
v.  
GIORDANO.

FLETCHER J. This is a petition presented by Francesco Giordano, asking the Court to grant a decree dissolving his marriage with the respondent on the ground of her adultery. The case stood over for argument, it appearing that the petitioner was an Italian subject, and that a question as to whether he retained his Italian domicile was set up on the evidence. It seems to me quite clear, first of all, that the petitioner is an Italian subject, notwithstanding Mr. Banerjee's statement that he has been enrolled in the civil force in this country and his allegiance to the Crown of Italy is not altered by such means. I have little doubt also that the petitioner retains his Italian domicile. His evidence is that he has no intention at present of returning to Italy. Under the circumstances, one has to consider whether the Court has jurisdiction to grant the petitioner a divorce under the terms of the Indian Divorce Act. Now, there can be no doubt that where the husband has a foreign domicile, that a decree in a divorce suit made by the Court other than that of his domicile, even if it is a divorce made in accordance with the Municipal law, will have no effect outside the territory in which the Court granting the decree is situate. There are many decisions to that effect. There is the case of *Le Mesurier v. Le*

(1) [1892] 3 Ch. 180.

1912  
GIORDANO  
v.  
GIORDANO.  
FLETCHER J.

*Mesurier* (1). That case expressly dissented from the dictum of Lord Colonsay in *Shaw v. Gould* (2). Lord Colonsay expressed an opinion that there might be a matrimonial domicile which fell short of either the domicile of origin or domicile of choice, and on that dictum apparently Sir Henry Maine framed the Indian Divorce Act under which it is provided that residence in India is sufficient to give the Court jurisdiction. That being so, I have to consider whether under the terms of the Indian Divorce Act I am bound to grant a decree in favour of the petitioner. I think I am bound to. Doubtless it will have a strange result. The petitioner will have a valid divorce in British India, but his marriage will be valid in every other civilized State of the world. But the law is clear that where the party is resident in British India, and the marriage is solemnized in India, then on the grounds specified in the Act the Court is bound to grant the petitioner a divorce. It seems to me notwithstanding the strange result that, though an Italian subject will remain married in the country where his domicile of origin is and in every other civilized country, under the terms of the Indian Divorce Act he is entitled to a divorce. I, therefore, grant a decree *nisi*.

Attorney for the petitioner, *S. C. Basack*.

(1) [1895] A. C. 517.

(2) (1868) L. R. 3. E. & I. App. 55.

J. C.

**APPEAL FROM ORIGINAL CIVIL.**

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and  
Mr. Justice Woodroffe.*

BAIJNATH

v.

AHMED MUSAJI SALEJI.\*

1912

Aug. 7.

*Arbitration—Bengal Chamber of Commerce, arbitration by—Award, filing of—Indian Arbitration Act (IX of 1899), ss. 11, 13, 14 and 15—Rules under the Indian Arbitration Act, 1899—Submission—Bought and sold notes—Stamp-duty—Form of Order—Costs.*

Where bought and sold notes relating to a contract for the sale of goods, contained an arbitration clause, and were stamped with one anna stamps :

*Held*, that, on the materials before the Court, the practice of stamping such documents with one anna stamps was not invalid, and the proceedings in arbitration were effectual.

Under the provisions of the Indian Arbitration Act, an award is to be filed not on the application of the parties, but at the instance of the arbitrator ; and when the award has been filed, the result is not that there is a suit in which a decree has been passed, but that there is an award which is enforceable as a decree.

*Tribhuvandas Kallindas Gajjar v. Sivachand* (1) and *In re a Bankruptcy Notice* (2) referred to.

Such of the rules of Court framed under the Indian Arbitration Act as are not in accordance with the Act are inoperative, and no effect can be given to them.

APPEAL by Baijnath, the legal representative of the petitioner, from the judgment of Fletcher J.

This appeal arose out of an application for an order that certain awards be filed in Court under the provisions of the Indian Arbitration Act of 1899. The material facts are set out in the following extract from

\* Appeal from Original Civil, No. 9 of 1912.

(1) (1910) I. L. R. 35 Bom. 196.

(2) [1907] I. K. B. 478.

1912

BAIJNATH

C.  
AHMED  
MUSAJI  
SALEJI.

the judgment of Fletcher J. who heard the application in the first instance :—

“The submission or rather the two submissions to arbitration are contained in two contract notes, both dated the 23rd December 1904, relating to the sale of certain B. Twill bags sold on account of Messrs. Hurdwary & Co. to Messrs. Ebrahim Soleman & Co. The submission which is in identical terms in both notes is in the following terms :—

“Any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce applicable for the time being for decision and such decision shall be accepted as final and binding on the both parties to this contract. The award may at the instance of either party and without any notice to the other of them be made a rule of the High Court of Judicature at Fort William.”

The Rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce (so far as material to be here stated) are as follows :—

V. The Secretary or officiating Secretary for the time being of the Chamber shall and he is hereby appointed to be and act as the Registrar of the Tribunal and his duties as such shall ordinarily consist of or include the following :—

He shall by himself or his subordinates receive submissions, references or applications to the Tribunal, and payment of fees and costs, notify the arbitrators, give notice of hearing and other notices to parties, keep a register of submissions references and applications to the Tribunal and a register of awards and keep such other books and memoranda and make such returns as the Chamber shall from time to time require, and shall render such assistance to the arbitrators in arbitrations as they may require and generally shall carry out the directions of the Chamber with regard to the conduct of arbitrations.

VI. That in every case where a dispute has arisen in relation to a contract which provides for a decision thereof by the Tribunal an application shall be addressed by either party to the Registrar who on receipt of such application shall constitute a Court by nominating in writing two or more arbitrators and also in case of need an umpire or if both parties in and by such application so desire a single arbitrator to adjudicate on the dispute. The consent of the arbitrators to act shall be obtained by the Registrar and the arbitration shall then be conducted in accordance with the following rules with which are incorporated where not expressly or impliedly provided to the contrary the provisions of the Indian Arbitration Act :—

(b) If any arbitrator or umpire decline or fail to act or if he die or become incapable of acting the Registrar may appoint a new arbitrator or umpire in his stead in like manner.

- (e) The parties to the reference and all persons claiming through them respectively shall subject to the provisions of any law for the time being in force submit to be examined by the arbitrators on oath or affirmation in relation to the matters in dispute and shall subject as aforesaid produce before the arbitrators all books deeds papers accounts writing and documents within their possession or power respectively which may be required or called for and do all other things which during the proceedings on the reference the arbitrators may require and particularly in the case of references relating to piece-goods or jute shall comply with the arbitrator's requirements as to production and selection of samples and otherwise.
- (f) The arbitrators shall have power to appoint a time and place for the hearing of references and within 7 days of notice on that behalf the parties shall prepare and submit to the Registrar a written statement with regard to the matter in dispute or difference.
- (g) No party to a reference shall without express permission of the arbitrators be entitled to appear in person or by counsel attorney or other advocate or advisor or before the arbitrators or insist on or require the arbitrators to hear or examine witnesses or receive oral or documentary evidence but the arbitrators at discretion may through the Registrar require the parties with or without witnesses to attend before them or before any Committee or Sub-Committee of the Chamber to be examined on or without oath or solemn affirmation.
- (j) The arbitrators may at their own instance at any time or times before making a final award consult refer to and act on and adopt the advice recommendations or suggestion of any Committee or sub-Committee of the Chamber having or exercising special jurisdiction or powers relating to the particular industry commodity produce or branch of trade concerned in the reference or of any experts whether members or not and may also at the expense of the parties consult and adopt the advice of solicitors or counsel upon any question of law evidence practice or procedure arising in the course of reference.
- (l) The arbitrators shall make their award in writing within 14 days after entering on the reference or on or before any later day to which the arbitrator by any writing signed by them may from time to time enlarge the time for making the award.
- (o) No award shall be set aside or varied or attempted to be set aside or varied by reason or on account of any informality

1912

BAIJNATH  
v.  
AHMED  
MUSAJI  
SALEJI.

1912  
 ———  
 BALNATH  
 P.  
 AHMED  
 MUSAJI  
 SALEJI.

omission or delay or error of the proceedings in or about the same or in relation thereto or on any other ground or for any misconduct short of collusion or fraud on the part of the arbitrator.

(g) The Indian Arbitration Act 1899 so far as the provisions thereof are not inconsistent with these rules shall apply to all references to the Tribunal.

The facts relating to the reference appears to be as follows :—

On the 30th March 1908 Messrs. Hurdwary & Co. forwarded to the Registrar of the Chamber of Commerce the two contract notes which contain the submissions to arbitration and informed him of the dispute that had arisen between the parties. On the same day the Registrar wrote to Messrs. Ebrahim Soleman & Co. and informed them of this fact. This letter also contained the following statement:—‘I shall be glad to receive your statement of the case at your early convenience but not later than week from date.’

Not receiving any answer to this letter the Registrar again wrote to Messrs. Ebrahim Soleman & Co. asking their immediate attention to their former letter and ending as follows :—‘I am constituting a Court to adjudicate upon this dispute.’

The Attorneys for Messrs. Ebrahim Soleman & Co. wrote to the Registrar on the 14th April stating certain grounds of objection which may shortly be stated as follows :—

(i) That the contracts were void having been entered into through a conspiracy between Hurdwary & Co. and one E. J. Timol who was formerly in the employ of Ebrahim Soleman & Co.; (ii) that the contracts were not for the *bona fide* sale of goods but were mere gambling transactions; (iii) that the persons constituting the firm of Ebrahim Soleman & Co. are owing to the death of parties and other circumstances different to those constituting the firm in 1904.”

On the 21st of April the Registrar appointed the two arbitrators who both accepted the office on the same day. No notification of the appointment of or acceptance of office by the arbitrators was given to either of the parties. It was admitted before me that neither of the parties knew the names of the arbitrators until this matter came on in Court. It appears that it is the practice of the Chamber to withhold notice of the appointment and names of the arbitrators from the parties to the reference.

On the 22nd April the Registrar sent the papers which he had in his possession to the arbitrators and on the same day the arbitrators directed the Registrar to send the papers that had been lodged by each party to the other side and giving time up to the 30th April for remarks to be sent in and the papers returned accordingly. On the 25th April the Registrar



wrote to both of the parties similar letters directing them to send in their answers by the 30th April but prohibiting them from raising any new matter. On the 27th April Messrs. Hurdwary & Co. sent in their answer and on the same date the attorneys for Messrs. Ebrahim Soleman & Co. wrote to the Registrar reiterating the objections they had raised in their former letter.

It appears that on the 29th April Messrs. Orr Dignam & Co. solicitors to the Chamber were consulted by the arbitrators as to the objections that had been raised by the attorneys of Ebrahim Soleman & Co.

On the 2nd of May the Registrar wrote to the attorney of Ebrahim Soleman & Co. stating that the arbitration must proceed and disagreeing with their objections. This letter as appears by the record was drafted by Messrs. Orr Dignam & Co. and one of the statements in this letter is of importance *viz*: The arbitrators have as empowered by the rule that govern the reference obtained legal advice on the law points raised in your letter. No notice however was taken of this letter from the Registrar.

On the 18th May the arbitrators by writing under their hands purported to extend the time for making the award till the 15th June.

On the 9th of June the Registrar sent copies of the award to each of the parties but omitting from the copy the names of arbitrators. The awards both bear date 4th of June and simply award a sum of money to be paid by Messrs. Ebrahim Soleman & Co. to Messrs. Hurdwary & Co."

On the 11th July 1908 Messrs. Hurdwary & Co. presented a petition for leave to file the awards in Court. The order was sought as against Ahmed Musaji Saleji, Mamooji, Moosaji and Ismail Ahmed Mahammadi, described as the surviving members of the firm of Ebrahim Soleman & Co., and now carrying on the winding up of the said firm. The application was opposed by Ebrahim Soleman & Co.

On the 27th August 1908, Fletcher J. refused the application, observing as follows :—

[After setting out the facts above cited, his Lordship continued :—]

"The first objection that appears to me from the record to have any substance in it is that the submissions to arbitration bear one anna stamps only being stamped under Article 43 of Schedule I to the Indian Stamp Act 1899.

It will be noticed that Article 4 refers only to a note or memorandum by a broker or agent to his principal intimating the purchase or sale on account of such principal of any goods exceeding in value Rupees 20.

1912

BAIJNATH  
v.  
AHMED  
MUSAJI  
SALEJI.

1912

BAIJNATH  
v.  
AHMED  
MUSAJI  
SALEJI.

Section 5 of the Indian Stamp Act 1899 enacts as follows :—

Any instrument relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments each comprising or relating to one of such matters would be chargeable under this Act.

Section 6 of the same Act enacts :

“ Subject to the provisions of the last preceding section an instrument so framed as to come within two or more of descriptions in Schedule I shall where the duties chargeable thereunder are different be only chargeable with the highest of such duties.”

Do then the contract notes comprise or relate to several distinct matters or are they so framed as to come within two or more of the descriptions in Schedule I to the Indian Stamp Act ?

The contract notes in addition to the intimation by the broker of the purchase or sale of the goods contain a submission in writing by the buyer and seller to refer disputes to arbitration signed by the broker as the authorised agent of the parties. To hold otherwise would mean that in this case there is no submission in writing signed by either of the parties in which case the award could not in any event be filed in Court as not being within the provisions of the Indian Arbitration Act.

If then the contract notes contain a submission to arbitration they fall within the provisions of Section 6 of the Indian Stamp Act. A submission to arbitration is chargeable with an eight-anna stamp under Schedule I Article 5 of the Indian Stamp Act as an agreement not otherwise provided for (*Srm Bagabai v. Shio Ram*, Bombay Printed Judgment 1883, page 151 referred to in K Seshadri Hiyangar's Stamp Law in British India Part I Schedule I page 46). I may also refer to Russell on Arbitration 9th edition page 56 where the learned author states that a submission to arbitration requires an agreement stamp under the provisions of the English Stamp Act 1891. There is no distinction on this point between the English and the Indian Stamp Act.

I am of opinion therefore that each of the contract notes should have borne a stamp of 8 annas. This being so it becomes material to consider Section 35 of the Indian Stamp Act 1899 which is in the following terms:—

“ No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon registered or authenticated by any such person or by any public officer unless such instrument is duly stamped.

The arbitrators even though the parties do not take the objection are bound by the Indian Stamp Act to take notice of any omission or insufficiency in the stamping of any document produced before them. They are

also to require under proviso (a) to Section 35 of the Indian Stamp Act before they receive in evidence or act under the submission the payment of the necessary duties and penalties (see Russell on Arbitration 9th edition page 157) In the present case the arbitrators being persons having authority by the consent of the parties to receive evidence acted upon the two submissions to arbitration without the same being duly stamped contrary to the provisions of Section 35 of the Indian Stamp Act.

Under the old practice an award had to be enforced in a suit and in such a suit the plaintiff had to prove the submission under which the arbitrators acted [*Ferrer v. Oren* (1)] and though under the provisions of the Indian Act an award may be enforced in the same manner as a decree yet it is still necessary to prove that the arbitrators acted under a valid submission.

The Arbitration Act has only in this respect made the procedure for enforcing an award simpler than that under the former practice.

Section 35 of the Indian Stamp Act is however clear in its provisions and forbids any person having by law or consent of the parties authority to receive evidence (as the arbitrators had in the present case) from acting upon it until it is duly stamped. How then can I say on the evidence before me that they acted on a valid submission when the statute expressing says that they shall not act upon it until sufficiently stamped. I must confess that I have been unable to see any way out of this difficulty. It may however be that if this were the only objection the court could remit the matter to the arbitrators.

The next objection is that the award was made out of time.

Rule VI(j) authorises the arbitrators to consult and adopt the advice of solicitors upon any question of law arising in the course of the reference that is after the arbitrators have entered upon the reference. Now it appears from the record that Messrs. Orr Dignam & Co. were consulted on the 29th April and they gave their advice on the 1st of May. That advice was given to the arbitrators in the course of the reference appears from the letter of the Registrar to the attorneys of one of the parties dated the 2nd May in which it is stated that the arbitrators have as empowered by the rules which govern the reference obtained legal advice on the law points raised. Therefore on the 29th April the arbitrators had entered on the reference.

Rule VI (I) provides that the arbitrators shall make their award in writing within 14 days after entering on the reference or on or before any later day to which the arbitrators by any writing signed by them may from time to time enlarge the time for making the award. The arbitrators purported to enlarge the time for making the award on the 18th of May.

1912  
BALJNATH  
v.  
AHMED  
MUSAJI  
SALEHI.

1912  
 BALNATH  
 v.  
 AHMED  
 MUSAJI  
 SALEJI.

But on that date the time for making the award had expired and an enlargement by the arbitrators after their original time has expired is inoperative (see Russell on Arbitration 116).

But then it is said that Rule VI (o) provides that no award shall be set aside or varied except for collusion on the part of the arbitrators. It is sufficient for me with regard to this objection to say that the present application is not one to set aside or vary an award.

I am therefore of opinion that the award was made out of time and is inoperative.

Now the next objection is that the reference was not conducted according to the rules applicable thereto.

On this objection the first point raised is that the arbitrators improperly concealed their names and the fact of their appointment. It is common ground between the parties that the arbitrators did conceal their names and that neither of the parties knew the names of the arbitrators until this application was made to the Court.

By Rule IV one of the duties of the Registrar is to notify arbitrators and give notice of hearing. Rule VI (g) provides that certain things may only be done with the express permission of the arbitrators.

It is clear to my mind that the rules contemplate the parties being notified of the appointment of the arbitrators so that they may apply to the arbitrators for the express permission mentioned in Rule VI (g). Again if the names of the arbitrators are withheld from the parties how can they apply to set aside the proceedings for fraud or collusion on the part of the arbitrators as contemplated by Rule VI (o) ?

The next objection on the rules is that the arbitrators did not appoint a time and place for the hearing of the reference.

In my opinion they failed in their duty in not doing so. By Rule VI (f) the parties have 7 days from the notice of appointment of a time and place for the hearing of the reference to submit their written statement. This period of 7 days does not begin to run until notice of appointment of a time and place for hearing of the reference has been given to the parties. I also think that the permission mentioned in Rule VI (g) to appear before the arbitrators is a permission to appear before them at the time and place appointed for the hearing under Rule VI (f).

Next it is said by the party opposing this application that Rule VI (g) is *ultra vires*.

In my opinion it is not. I doubt very much whether this rule goes further than the general rule of Law. Whether the arbitrators should or should not hear evidence and the parties by counsel or otherwise must depend on the particular circumstances in every case. The rule vests a discretion in a person exercising judicial functions which must be exercised

in a judicial manner. Thus there are many arbitrations where the arbitrators are experts where it is not necessary for them to hear evidence or the parties as the arbitrators have themselves the expert knowledge rendering them capable of deciding the matter without hearing evidence or the parties. On the other hand the reference may be such that the arbitrators cannot decide the matter in dispute without hearing evidence and the refusal to hear evidence in such a case would amount to misconduct on the part of the arbitrators. In the present case the arbitrators were correct in declining to hear evidence on the allegation of fraud which went to the invalidity of the submission. On the other hand they acted improperly in not taking evidence to ascertain who were the parties liable on the contracts. The arbitrators have never considered this matter at all and the form of the award is made against a firm and there is nothing to shew who the members of that firm are.

The section of the Contract Act referred to by the solicitors to the arbitrators has nothing to do with it.

The present application is to file the award in Court so that it may have the effect of a decree of this Court. But this Court cannot make a decree against a firm when it is ignorant as to what persons constitute the firm. This being so I am of opinion that not only did not arbitrators act improperly in not taking evidence on this issue but also that the award is bad on the face of it. But then it is said by the applicant that whatever misconduct there may have been on the part of the arbitrators this is cured by Rule VI (c). As I have already pointed out this rule does not apply as the present application is not one to set aside or vary the award. But even if the application were one to set aside the award I am of opinion that Rule VI (c) would be no bar to the jurisdiction of the Court to do so if misconduct on the part of the arbitrators were shown or if it were shown that the awards were improperly procured.

Section 14 of the Indian Arbitration Act vests in the Court a discretion to do so in any case where the arbitration is a proceeding under that Act and it is not competent for the parties by agreement to oust this jurisdiction if they desire that the award should be enforced under the provisions of that Act. For the above reasons I am of opinion that the present application fails.

The applicant must pay the costs of this application."

The order was completed and filed on the 12th February 1912.

From this order the present appeal was preferred by Baijnath, the legal representative of Hurdwary Mull who had been carrying on business under the firm name of Hurdwary & Co.

1912

BAIJNATH  
v.  
AHMED  
MUSAJI  
SALEJI.

1912  
 BAIJNATH  
 v.  
 AHMED  
 MUSAJI  
 SALEJI.

*Mr. Pugh* (*Mr. W. Gregory* with him), for the appellant. Fletcher J. was in error in holding that the proceedings in arbitration were vitiated because the contract notes were insufficiently stamped. The want of stamp or insufficiency of stamp would not invalidate the submission. Further, it is submitted it was quite unnecessary to stamp the contract notes with eight-anna stamps on account of the arbitration clause: *The Bombay Co., Ltd., v. The National Jute Mills Co., Ltd.*(1). The practice has always been otherwise [Mr. Pugh was stopped on this point]. The other two points which the respondents urge are—(i) that the award was out of time, and (ii) that the award was made against a firm and there is nothing to shew who the members of the firm were. These points cannot be taken at this stage. Their correct course was to move the Court to set aside the award under section 14 of the Arbitration Act: *Thorburn v. Barnes*(2), *Bache v. Billingham*(3).

*Mr. B. C. Mitter* (*Mr. A. N. Chaudhuri* with him), for the respondents. I do not press the question of the insufficiency of the stamp, as it could always be cured by a penalty. The points I press are—(i) that the award was out of time, and (ii) that the award was made against the firm, whereas the appellants claimed relief against particular individuals. Rules were framed by the High Court under section 20 of the Indian Arbitration Act. Under rules 7 to 9 this is the proper time for us to raise our objections to the award. Under the rules, once the award is filed, there is no further opportunity to set aside the award.

[JENKINS C.J. The rules appear to be in conflict with the provisions of the Act, and to that extent are inoperative.]

(1) (1912) L. L. R. 39 Calc. 669. (2) (1867) L. R. 2 C. P. 384.

(3) [1894] 1. Q. B. 107.

If the Court holds the rules are bad, and that an order should be made for filing the awards, the awards should be taken to be filed as of date, so that we may have an opportunity of raising our objections to the awards.

1912

BALNATH

v.

AHMED

MUSAJI

SALEJI.

JENKINS C.J. This appeal arises out of an application preferred as far back as the 11th of July 1908, whereby it was prayed that an order should be made that certain awards be filed in Court under the provisions of the Indian Arbitration Act of 1899. The respondent formulated his objections in an affidavit, but the principal ground on which the application failed before the learned Judge by whom it was heard in the first instance was that the whole proceedings in arbitration were ineffectual, because the submission was insufficiently stamped. We cannot accept that view. The parties have stamped their document in accordance with the practice which has been recognised by this Court for a long series of years, and we are not prepared to question that practice on the materials at present before us.

But, apart from that, there were certain other grounds on which the learned Judge thought there was a difficulty in the petitioner's way, and in particular he considered that the award was out of time and that there was a difficulty as to who were the members of the firm against whom the award went.

A good deal of difficulty in this case has been occasioned by the rules of Court framed under the Arbitration Act. But it appears to me that so far as they do create a difficulty, they are not in accordance with the Act. Effect, therefore, cannot be given to them. The Arbitration Act provides that the High Court may make rules consistent with the Act, and in particular as to the filing of awards and all

1912  
 BAIJNATH  
 v.  
 AHMED  
 MUSAJI  
 SALEJI.  
 JENKINS C.J.

proceedings consequent thereon or incidental thereto, and all proceedings in Court under the Act. Now, the Act itself provides in section 11 that "when the arbitrators or umpire have made their award, they shall sign it, and shall give notice to the parties of the making and signing thereof and of the amount of the fees and charges payable to the arbitrators or umpire in respect of the arbitration and award." The second clause of the section provides that "the arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him, and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges of filing the award, cause the award, or a signed copy of it, to be filed in the Court; and notice of the filing shall be given to the parties by the arbitrators or umpire." That clause appears to me to be clear. Then it is provided in section 13 that the Court may remit the award, and in section 14 that "where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set aside the award." Section 15 provides that an award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall, subject to certain exceptions, be enforceable as if it were a decree of the Court. The filing therefore is an act to be done, not on the application of the parties, but at the instance of the arbitrator; and when the award is filed, the result is, not that there is a *suit* in which a *decree* has been passed, but that there is an award which shall be enforceable as though it were a decree. This topic is very clearly discussed in *Tribhuwandas Kallianadas Gajjar v. Jivanchand* (1), where reference is made to *In re a Bankruptcy Notice* (2), an English

(1) (1910) I. L. R. 35 Bom. 196.

(2) [1907] 1 K. B. 478.



decision on a cognate section. In the circumstances it appears to me that we must adhere to the Act; and what we must now do is to direct, as the petitioner prayed, that the award be filed. The filing must be as of the date when it should have been filed, that is the 27th of August 1908: but as this order is made only today, that fact must be borne in mind if the respondents consider that they have any objection which they can urge in accordance with the terms of the Act. We must, therefore, set aside Mr. Justice Fletcher's order, and direct the award to be filed.

Costs throughout will be added to the sum awarded, so that the enforcement of their payment will depend upon the power to enforce payment under the award.

WOODROFFE J. I agree.

*Appeal allowed.*

Attorneys for the appellant: *Leslie and Linds.*

Attorneys for the respondents: *S. D. Dutt & Ghose.*

J.C.

1912

BAIJNATH  
v.  
AHMED  
MUSAJI  
SALEJI.

JENKINS C.J.

## ORIGINAL CIVIL.

Before Mr. Justice Chudhuri.

1912

Aug. 2.

SARAT CHANDRA GHOSE

v.

PRATAP CHANDRA GHOSE.\*

*Trust—Deed of Trust, construction of—Uncertainty—Gift for “religious acts” (dharmakarmarthe) and for “religious purposes” (dharmaoddeshe)—Works of public good—Discretion of trustee.*

A settlor by a deed of trust in the Bengali language after declaring that for religious acts (*dharmakarmarthe*), with a desire for the spiritual benefit of the deceased forefathers, and to please Vishnu she made over the properties covered by the deed for religious purposes (*dharmaoddeshe*), proceeded to direct that certain Thakoores should be worshipped and maintained, and the annual *Durgotsab* performed out of the income of the trust estate and further, by the sixth clause of the trust deed, provided that out of the income which should remain after incurring the expenses aforesaid a sum not exceeding one thousand rupees should be applied in supporting the poor, the blind, and the destitute, and in imparting education, in *upanayan* (assumption of the sacred thread ceremony), in removing marriage difficulties (getting girls married), or in works of public good. It was to be paid at the discretion of the trustee toward dispensaries, hospitals, charitable societies, schools, or any students' education, feeding of the poor etc., marriage, *upanayan* etc., excavation and consecration of tanks etc., in villages having a dearth of water, or in the construction and consecration of *ghats* and *maths*. The trustee for the time being had under the deed discretion to render assistance beyond a thousand rupees and had also full power to decide where or for whose education, *upanayan*, or for whose daughter's marriage the same should be applied.

*Held*, that such directions as were contained in the sixth clause of the trust deed were void and inoperative for vagueness and uncertainty.

*Trikumdas Damodhar v. Haridas Morarji* (1), *Grimond (or Macintyre) v. Grimond* (2), *Bai Chadunbai v. Dady Nusserwanji Dady* (3), *Williams*

\* Original Civil Suit No. 539 of 1910.

(1) (1907) I. L. R. 31 Bom. 583.

(2) [1905] A. C. 124.

(3) (1901) I. L. R. 26 Bom. 632.

v. *Kershaw* (1), *Surbomungola Dabee* v. *Mohentronuth Nath* (2) and *Ranchordas Vandravandas* v. *Parvatilal* (3) referred to.

1912

SARAT  
CHANDRA  
GHOSE  
v.  
PRATAP  
CHANDRA  
GHOSE.

THIS was a suit praying, *inter alia*, for a declaration that a certain deed of trust in the Bengali language dated the 7th day of May 1880 and executed by one Sreematee Padmabati Dasee, whereof the defendant, Pratap Chandra Ghose, was the sole surviving trustee was void and inoperative, and that the properties originally dealt with thereunder were divisible amongst the plaintiff and the defendants, the plaintiff being entitled to an equal one-fourth share therein. The plaintiff and the defendants, Pratap Chandra Ghose and Ganendra Chandra Ghose, were the surviving sons of Sreematee Padmabati Dasee who died on April 16th, 1900. The defendants, Jayatsen Ghose and Ranatsen Ghose together with the infant defendant, Sreematee Kanchan Kumari Dasee, were the heirs of Debendra Chandra Ghose who was the fourth and only other son of Sreematee Padmabati Dasee and who died on March 4th, 1903.

In the year 1908 a partition was effected of the joint property of the surviving sons of Sreematee Padmabati Dasee and the representatives of the deceased son Debendra Chandra Ghose.

The plaint contained various charges of fraud, undue influence, and misconduct against the defendant Pratap Chandra Ghose, which he denied in his written statement, and some evidence in respect of these charges was given at the trial. They were, however, subsequently abandoned, and the plaintiff elected to base his claim entirely upon the construction of the deed of trust. The points arising upon the construction appear with sufficient clearness from the judgment of the learned Judge.

(1) (1835) 5 Cl. & F. 111.

(2) (1879) I. L. R. 4 Cal. 508.

(3) (1899) I. L. R. 23 Bom. 725 ; L. R. 26 I. A. 71.

1912

SARAT  
CHANDRA  
GHOSE  
v.  
PRATAP  
CHANDRA  
GHOSE.

*Mr. H. D. Bose and Mr. B. L. Mitter*, for the plaintiff. The deed of trust is void for uncertainty: Lewin on Trusts, 12th Edition, p. 152. A gift to trustees for *dharan* is void: *Runchordas Vandravandas v. Parvatibai* (1). A gift "to such charitable or religious institutions as my trustees may select and in such proportions to each or any as they may fix" is bad: *Grimond (or Macintyre) v. Grimond* (2). The Court could not supervise the administration of a trust of this nature: *Trikumdas Damodhar v. Haridas Morarji* (3), *Bai Chadunbai v. Dady Nusserwanji Dady* (4), *Surbomungola Dabee v. Mohendro-nath Nath* (5).

*Mr. B. C. Mitter and Mr. N. N. Sircar*, for the defendant, Pratap Chandra Ghose, submitted to the judgment of the Court.

*Mr. M. N. Basu and Mr. J. K. Sinha*, for the defendant, Ganendra Chandra Ghose.

*Mr. N. C. Sen* for the defendants, Jayatsen Ghose and Ranatsen Ghose.

*Mr. P. Roy Chaudhuri*, for the defendant, Kanchan Kumari Dasee.

CHAUDHURI J. This was a suit to obtain a declaration that a deed of trust executed by Padmabati Dasee, mother of the plaintiff, affecting certain of her properties was void and inoperative, and that he and her other heirs were entitled to a partition of these properties according to their shares. The plaintiff gave some evidence, but has elected not to go on with it, and rests his claim entirely on the construction of the trust deed. He contends that the trusts

(1) (1899) I. L. R. 23 Bom. 725 ;

L. R. 26 I. A. 71.

(2) [1905] A. C. 124.

(3) (1907) I. L. R. 31 Bom. 583.

(4) (1901) I. L. R. 26 Bom. 632.

(5) (1879) I. L. R. 4 Calc. 508.

created by the sixth clause are void and inoperative. It is, therefore, unnecessary to deal with the evidence recorded.

The reason for executing the trust deed is given in the following passage, taken from the Court translation: "Now I do, for religious acts (*dharmakarmarthe*) with a desire for the spiritual benefit of the deceased forefathers, and to please Vishnu, make over, for religious purposes (*dharmoddeshhe*)" etc. The expressions "religious acts" and "religious purposes" do not accurately render the equivalent Bengali expressions which connote more.

The lady then directs that from the income of the immoveable property belonging to her, certain Thakoors are to be worshipped and maintained and that the income derived from her moveable properties is to be applied for the performance of the annual *Durgotsab*. This is followed by the following directions:—*Sixth clause*.—"Out of the income which shall remain after incurring all the aforesaid expenses a sum not exceeding one thousand rupees shall be applied to supporting the poor, the blind, and the destitute, and in imparting education, in *upanayan* (assumption of the sacred thread ceremony), in removing marriage difficulties (getting girls married), or in works of public good, that is, shall be paid at the discretion of the trustee towards dispensaries, hospitals, charitable societies, schools, or any students' education, feeding the poor etc., marriage *upanayan*, etc., excavation and consecration of tanks etc. in villages having dearth of water, construction and consecration etc. of *ghats* and *maths*, and the trustee shall, at his discretion, have power to render assistance beyond a thousand. The trustee for the time being shall have full power in the matter of deciding where or for whose education, or *upanayan*, or for whose daughters' marriage the

1912

SARAT  
CHANDRA  
GHOSE  
v.PRATAP  
CHANDRA  
GHOSE.CHAUDHURI  
J.

1912

SARAT  
CHANDRA  
GHOSE

v.

PRATAP  
CHANDRA  
GHOSE.CHAUDHURI  
J.

same shall be applied. The poor, the blind, the destitute, the helpless, and students having no means, or persons having daughters to be married belonging to the lines of my sons and daughters are not outside the class of the poor, the blind, the destitute, the helpless students having no means, and persons having daughters to marry mentioned above.

*“Seventh clause.*—The trustee shall take from the executor of my will the amount which will be due according to the provisions of the will and the said money shall form a portion of the property mentioned in the fourth provision of this Deed of provisions.

*Eighth clause.*—If after all the above expenses there be any balance out of the income of the Government securities or of the property acquired in exchange therefor, the same shall be gradually laid by, because the prices of the articles etc. are gradually rising and will rise, therefore in the event of their being increased in expenditure, increase in the original fund will be necessary. Should ever any one in the lines of my sons being in straitened circumstances, or having daughter to marry or son to educate have no other means, which God forbid, the trustee for the time being shall, at his discretion, help him as much as may be possible, no one, however, shall have any claim or objection thereto.

*Ninth clause.*—If there be any balance after the aforesaid expenses the same shall be gradually laid by, and in the event of any body in my line being in straitened circumstances, which God forbid, the trustee for the time being shall at his discretion occasionally help him a little. No one shall have any claim or objection thereto. The same shall be like an absolute donation.”

In the original, there is a full-stop after the words “or in works of public good,” in the sixth clause,

and the next sentence begins with “*যথা*” (*for example* or “*that is,*” as in the Court translation), “hospitals, charitable dispensaries etc., etc.”

It has been held in a long series of cases that unless the subjects and objects of a trust of the character mentioned in clause six can be ascertained, the trust must be held to be bad.

In *Trikumdas Damodhar v. Haridas Morarji* (1) Chandavarkar J. held that there could be no doubt upon the authorities that a bequest “for purposes of popular usefulness or purposes of charity” was void for uncertainty. In *Grimond (or Macintyre) v. Grimond* (2), Lord Halsbury held that a bequest to such charitable or religious institutions, and societies as the trustees might select, was void for uncertainty. The directions are so vague that the Court is not called upon to make a new will for the testator.

In this case the words are similar. Purposes of popular usefulness, of charity, of religious acts are all mixed up and absolute discretion has been given to the trustee to apply any portion of the fund to any of them. I, therefore, hold that the whole of the trust in that clause, is inoperative. It would be impossible for any Court to correct or reform the maladministration of such a trust, or direct due administration thereof. In *Bai Chadunbai v. Dady Nusserwanji Dady* (3), Stirling J. following *Williams v. Kershaw* (4) held, where the gift was for benevolent, charitable and religious purposes, it meant benevolent, or charitable or religious purposes and, therefore, the bequest was void for uncertainty. Reference has also been made to *Surbomungola Dabee v. Mohendranath Nath* (5), in which White J. held that a trust for

1912  
SARAT  
CHANDRA  
GHOSE  
v.  
PRATAP  
CHANDRA  
GHOSE.  
CHAUDHURI  
J.

(1) (1907) I. L. R. 31 Bom. 583.

(3) (1901) I. L. R. 26 Bom. 632.

(2) [1905] A. C. 124.

(4) (1835) 5 Cl. & F. 111.

(5) (1879) I. L. R. 4 Calc. 508.

1912

SARAT  
CHANDRA  
GHOSE  
v.

PRATAP  
CHANDRA  
GHOSE.

CHAUDHURI  
J.

purposes of construction and erection of a pucca bathing ghat, at a suitable place on the river Hooghly surrounded by a chandney, and two temples of Siva, was void for uncertainty. This case shows to what extent our Courts have gone against bequests of a vague and uncertain character.

It was held in *Runchordas Vandravandas v. Parvatibai* (1), that a gift for *dharam* was too vague to be given effect to. It was said that the objects which can be considered to be meant by the word are too vague and uncertain for the administration of them to be under any control. Having regard to all these decisions and upon the construction of the document, I hold, as I have already said, that the trusts in clause six are inoperative.

The result, therefore, is that the properties dealt with in the trust deed, or such properties as now represent them, are merely charged with such necessary expenses as were incurred in the lifetime of the lady for the maintenance and worship of the Thakoors mentioned in the third clause, and the annual *Durgotshab* mentioned in the fourth clause.

To avoid an expensive reference the parties have agreed to a scheme of management in respect of these properties. Those terms will be put in signed by the adult parties.

So far as the infants are concerned, I hold that the termination of this suit in this manner is beneficial for them. There was prospect of long and bitter litigation involving expensive enquiries, and I consider it for their benefit that the suit, should have terminated in this way. I sanction the scheme as for their benefit.

Attorney for the plaintiff: *M. M. Chatterji*.



Attorney for the defendant, Pratap Chandra Ghose :  
*G. C. Dey.*

Attorneys for the defendant, Ganendra Chandra  
 Ghose : *B. N. Basu & Co.*

Attorney for the defendants, Jayatsen Ghose and  
 Ranatsen Ghose : *M. M. Chatterji (junior).*

Attorney for the guardian *ad litem* of the defend-  
 ant, Kanchan Kumari Dassee : *B. B. Newgie.*

H. R. P.

1912

SARAT  
CHANDRA  
GHOSE  
v.  
PRATAP  
CHANDRA  
GHOSE.

## CRIMINAL REVISION.

*Before Mr. Justice Holmwood and Mr. Justice Carnuluff.*

POCHAI METEH

*v.*

EMPEROR.\*

1912

Aug. 10.

*Sanction for prosecution—Appeal, right of—Grant or refusal of sanction  
 by a lower authority—Application to superior authority whether a matter  
 of appeal or revision—Limitation of the period of such application—  
 Criminal Procedure Code (Act V of 1898), s. 195 (6)—Limitation Act  
 (IX of 1908), Sch. I, Art. 154.*

Sub-section (6) of s. 195 of the Criminal Procedure Code does not confer  
 a right of appeal to the superior authority, but only invests the latter with  
 powers by way of revision.

*Hardeo Singh v. Hanuman Dat Narain* (1), *Muthuswami Mudali v.  
 Veeni Chetti* (2) discussed and distinguished.

*Hari Mandal v. Keshab Chandra Manna* (3), *Mehdi Hasan v. Tota Ram*  
 (4) approved. *Rum Charan Talukdar v. Taripulla* (5) referred to.

Where the question arises with reference to Article 154 of the Limita-  
 tion Act (IX of 1908), it has merely to be stated that there is a doubt as to

\* Criminal Revision, No. 983 of 1912, against the order of M. Yusuf,  
 Sessions Judge of Burdwan, dated June 4, 1912.

(1) (1903) I. L. R. 26 All. 244.

(3) (1912) 16 C. W. N. 903.

(2) (1907) I. L. R. 30 Mad. 382.

(4) (1892) I. L. R. 15 All. 61.

(5) (1912) I. L. R. 39 Calc. 774.

1912  
 POCHAI  
 METEH  
 v.  
 EMPEROR.

whether an appeal lies or not in such a case in order to give the applicant the benefit of the longer period. The High Court accordingly directed the Sessions Judge to hear an application to revoke a sanction made to him after the expiry of a month from its date.

*In re North. Ex parte Hasluck* (1), *Gopal Lal Sahai v. Bahorni* (2) followed.

THE facts were as follows. On 29th May 1911, the petitioner lodged an information at the thana that one Kali Churn Ta had been caught in the act of stealing some mangoes. Before the termination of the police investigation which followed in respect of the alleged offence, the petitioner presented an application to Moulvie A. Samad, Deputy Magistrate of Burdwan, impugning the conduct of the police, and praying for a summons and judicial inquiry. After the receipt of the police report to the effect that the information was false, the Magistrate directed the issue of a notice on the petitioner to show cause why he should not be prosecuted under s. 211 of the Penal Code; whereupon the latter again prayed for a judicial determination of his complaint of theft, and the Magistrate appeared to have fixed a date for its hearing. On the 13th June 1911, Kali Churn Ta filed a cross complaint against the petitioner for wrongful confinement and assault, which the Court directed to be put up pending the theft case. The Magistrate, after examining several witnesses in the petitioner's case, dismissed the complaint on the 25th July, and accorded sanction to prosecute him, and then proceeded with the counter case.

On application by the petitioner to the District Magistrate, he directed a further inquiry into the complaint, and set aside the sanction by his order dated the 4th August 1911. Thereupon, Kali Charan moved the High Court and obtained a Rule on the District Magistrate to show cause why his order should not be

(1) [1895] 2 Q. B. 264, 270.

(2) (1911) 15 C. L. J. 120.

quashed, which was made absolute, on the 10th January 1912, on the ground of want of jurisdiction. After the receipt of the High Court record, the case was put up on the 12th February before the Joint Magistrate in charge, who directed the petitioner to appear and answer the complaint against him, under s. 342 of the Penal Code, brought by Kali Charan. On the 24th February, the petitioner applied to the Sessions Judge of Burdwan for revocation of the sanction, and for confirmation of the order of the District Magistrate as to a further inquiry. The Sessions Judge, however, without entering into the merits of this application, rejected it, on the 4th June, on the ground that it was in the nature of an appeal, and therefore barred under Art. 154 of the Limitation Act.

*Babu Manmatha Nath Mukherjee*, for the petitioner.

*Babu D. N. Bagchi* and *Babu Raj Kumar Roy*, for the opposite party.

HOLMWOOD J. The question which arises upon this Rule is whether the provisions of Article 154 of the Limitation Act are applicable to proceedings under section 195 of the Code of Criminal Procedure or, in other words, whether that section grants a right of appeal as laid down in section 404 of the Code.

Now section 404 of the Code states very precisely that no appeal shall lie from any judgment or order of the Criminal Court, except as provided for by this Code or by any other law for the time being in force.

In order, therefore, to give a right of appeal, section 195 must contain, in our opinion, within itself a distinct declaration that there is a right of appeal, and we can find no such declaration either expressly or by implication. It is true that a Full Bench of the Allahabad Court in the case of *Hardeo Singh v.*

1912  
POCHAI  
METEH  
n.  
EMPEROR.

1912  
 POCHA1  
 METEH  
 v.  
 EMPEROR.  
 HOLMWOOD  
 J.

*Hanuman* (1) held, in answer to an academic question, that the expression in section 439 giving certain powers to a Court of appeal raised an inference that the Legislature in referring to a "Court of appeal" in connection with section 195 sub-section (6), regarded the application to be made under that sub-section as an application made to a Court of appeal, and, therefore, in the nature of an appeal. But the Full Bench went on to say: "It does not appear, however, to us at all material by what name the application is called in pursuance of which the Appellate Court sets aside an order for sanction, and gives sanction under the provisions of section 195."

The Allahabad Court had not before it this question of limitation, and this question is the only question upon which the designation of the proceeding under section 195 could be of any importance whatever, and it is, therefore, solely in connection with this point of limitation that we are concerned with it.

There is another ruling, to which we have been referred, in *Muthuswami Mudali v. Veeni Chetti* (2) in Madras. This is also a ruling of a Full Bench of that Court in which the question was decided whether on revocation of a sanction by a lower Appellate Court the party aggrieved could proceed to the High Court in the same way as it could if there had been a refusal of sanction: and the Full Bench held that the revocation of sanction was precisely the same thing as a refusal of sanction, and that the same right of proceeding to the authorized Appellate Court, as laid down in section 195, was given to the party aggrieved. In coming to this decision the Full Bench has somewhat loosely made use of the expression "right of appeal," and this has been used throughout the judgment; but it does not touch the point before us, and for

(1) (1903) I. L. R. 26 All. 244.

(2) (1907) I. L. R. 30 Mad. 382.

the purposes of that decision it did not in the least matter whether the Full Bench made use of the words "right of appeal" or right of petitioning for sanction or revocation of sanction.

The only case reported which deals with the matter directly is the case of *Hari Mandal v. Keshab Chandra Manna* (1) to which one member of the present Bench was a party. It is there laid down that, inasmuch as an application under sub-section (6) of section 195 of the Criminal Procedure Code is not an appeal, within the meaning of sub-section (2) of section 22 of the Bengal Civil Courts Act, the Court to which an application to revoke a sanction or grant a sanction is made cannot transfer the case to a Subordinate Judge. This case perhaps does not cover the whole ground, but it certainly is authority for the view that an application under section 195 is not an appeal within the meaning of section 404. It had already been decided in a sense by another Bench of this Court in *Ram Charan Talukdar v. Taripulla* (2), and I may mention that the Criminal Bench of this Court, over which I have had the honour to preside for the greater part of the last two years, has decided, on more than one occasion, that an application under section 195 is not an appeal, although that was not decided with regard to this question of limitation. But as this is a question of limitation, it has merely to be stated that there is a doubt as to whether this is an appeal or not to give the applicant the benefit of the longer period. That is a rule which has been laid down by Lord Esher in the case of *In re North. Ex parte Hasluck* (3), and it is a rule which has always been followed in this Court and is cited in *Gopal Lal Sahai v. Bahorni* (4).

1912

POCHAI  
METEH  
v.

EMPEROR.

HOLMWOOD  
J.

(1) (1912) 16 C. W. N. 903.

(3) [1895] 2 Q. B. 264, 270.

(2) (1912) I. L. R. 39 Cal. 774.

(4) (1911) 15 C. L. J. 120.

1912  
 ———  
 POCHAI  
 METEH  
 v.  
 EMPEROR.  
 ———  
 HOLMWOOD  
 J.

Speaking for myself, I think that the considerations set out by Knox J. in the case of *Mehdi Hasan v. Tota Ram* (1) are of extreme force and lay down the correct view of the law, but it is only necessary to hold, although we do not so hold, that there is any doubt on the subject, to give the applicant the benefit of the law of limitation. While, therefore, we have no doubt in our own minds that there is no appeal under section 195 and that it is a matter of revision, we have no hesitation in making the Rule absolute, and directing that the learned Judge in the Court below should deal with the matter as if there was no limitation at the time of hearing the application.

The stay of the charge under section 342 is no longer necessary, and may be discharged, but stay of the trial under section 211 will, of course, abide the result of these proceedings. The Rule is made absolute, and the case remanded to the lower Court.

CARNDUFF J. I agree. Sub-section (6) of section 195 of the Code of Criminal Procedure, 1898, provides that any sanction given or refused under that section may be revoked or granted by the higher authority indicated. I think that this language is such as to confer, not a right of appeal on the person aggrieved by the grant or refusal to the higher authority, but a discretionary power of interference on the higher authority. What is given is not a right of appeal from below, but power to intervene, if thought advisable, from above.

E. H. M.

*Rule absolute.*

(1) (1892) I. L. R. 15 All. 61.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Beauchroft.

RAJ KRISHNA DEY

v.

BIPIN BEHARI DEY.\*

1912

June 19.

*Court-fee—Declaratory suit—Consequential relief—Injunction, prayer for  
—Endowment—Valuation of suit—Jurisdiction—Specific Relief Act  
(I of 1877), s. 42—Court-fees Act (VII of 1870), s. 7 (iv) (c)—Suits  
Valuation Act (VII of 1877), s. 8.*

The plaintiff brought a suit for declaration that he was the sole *shebait* of the family deity, and was entitled as such to exclusive possession of the disputed properties on behalf of the deity, and also for a declaration that the registration of the name of the principal defendant as joint owner of the endowed properties with the plaintiff in the books of the Collector was improperly made. He valued the suit, for purposes of jurisdiction, at Rs. 11,005, and paid Rs. 10 as court-fees under Schedule II, Art. 17 (iii) of the Court-fees Act. Subsequently, on an objection taken under s. 42 of the Specific Relief Act by the principal defendant at the hearing of the suit, a prayer was added in the plaint for an injunction prohibiting the principal defendant from interfering with the plaintiff performing his duties as *shebait* and managing the *debutter* properties, and a further *ad valorem* fee was paid by the plaintiff under Schedule I, read with s. 7 (iv)(d) of the Court-fees Act, for the injunction. The Court of first instance having heard the suit and dismissed it on the merits, the plaintiff appealed to the High Court, and upon the memorandum of appeal he paid court-fees in the same manner as in the Court of first instance :

*Held*, that the prayer for injunction was arbitrarily undervalued, that its value was the value of the relief claimed, and that the plaintiff was bound to pay *ad valorem* court-fees upon the plaint and memorandum of appeal on the basis that the value of the relief claimed was Rs. 11,005.

*Umatal Batul v. Nanji Koer* (1), *Dayaram Jagjivan v. Gordhandas Dayaram* (2) and *Boidya Nath Adya v. Makhan Lal Adya* (3) referred to.

\* Appeal from Original Decree, No. 118 of 1910.

- (1) (1907), 11 C. W. N. 705 ; (2) (1906) I. L. R. 31 Bom. 73.  
6 C. L. J. 427. (3) (1890) I. L. R. 17 Calc. 680.

1912  
 RAJ  
 KRISHNA  
 DEY  
 v.  
 BIPIN  
 BEHARI DEY.

APPEAL by Raj Krishna Dey, the plaintiff.

This was a suit brought on the 10th July 1908 by the plaintiff against Bipin Behari Dey and other members of a joint Hindu family for a declaration of his, the plaintiff's, title as sole *shebait* of the family deity, for a further declaration that he, the plaintiff, was entitled to the exclusive possession of the disputed properties on behalf of the deity, and also for a declaration, that the registration of the name of Bipin Behari Dey as joint owner of the endowed properties with the plaintiff in the books of the Collector was improperly made. He valued the suit for the purposes of jurisdiction at Rs. 11,005, and paid Rs. 10 as court-fees on a valuation of the same under Schedule II, Art. 17 (iii) of the Court-fees Act. On the 14th May 1909, when the case came on for trial, the defendant, Bipin Behari Dey, took the preliminary objection, that the suit was not maintainable in view of the provisions of section 42 of the Specific Relief Act. The plaint was accordingly amended by the addition of a prayer, that Bipin Behari Dey be prohibited from interfering with the plaintiff performing his duties as *shebait* and managing the *debutter* properties, and a further *ad valorem* fee of Rs. 75 was paid by the plaintiff under Schedule I, read with section 7 (iv) (d) of the Court-fees Act, for the injunction. Upon the suit being dismissed on the merits by the Subordinate Judge, the plaintiff appealed to the High Court, paying the court-fees on the memorandum of appeal in the same manner as in the Court of first instance.

*Babu Tarak Chandra Chakravarti*, for the respondent. I have a preliminary objection to take in this appeal as to its incompetency. Originally the suit was brought on payment of Rs. 10 as court-fees. The court-fees on the memorandum of appeal were



paid in the same manner as on the plaint. The appeal is, therefore, valued at Rs. 1,000. Under the provisions of section 8 of the Suits Valuation Act, the value as determinable for the computation of court-fees and the value for the purposes of jurisdiction is the same. This appeal, therefore, lies to the District Judge, and not here. This suit, as framed, came under section 7 (*iv*)(c) of the Court-fees Act. It was virtually a suit for recovery of possession, and no amount of circumlocution will make it otherwise. The prayer for injunction was nothing more than a prayer for possession. The stamp duties paid by the plaintiff on the plaint and on the memorandum of appeal are, consequently, insufficient to bring this appeal within the jurisdiction of the High Court.

*Babu Hara Kumar Mitra*, for the appellant. It has been held by the Court of first instance that the plaint in this suit was properly stamped. When a declaration is sought for, and the declaration is for, possession of property worth more than Rs. 5,000, as in the present suit, an appeal will lie to this Court. In this case it was not the proprietary right, but the *shebaitship*, that was claimed. My submission is, that the plaintiff has paid the proper court-fees for a mere declaratory suit and is not liable to pay more, and that he is entitled to bring his appeal in the High Court on the basis of the valuation of his suit. I am prepared, however, to pay the full amount of court-fees on the memorandum of appeal, and I ask for time to pay the same.

The respondent was not called upon to reply.

MOOKERJEE AND BEACHCROFT, JJ. A preliminary objection has been taken to the competence of this appeal. The appeal arises out of a suit in which the plaintiff seeks for declaration that he is a sole *shebait*

1912  
 RAJ  
 KRISHNA  
 DEY  
 v.  
 BIPIN  
 BEHARI DEY.

of Lakhi Barahu Jiu and the principal defendant is not a *shebait* of the idol, and also for an injunction to restrain the defendant from interfering with his possession of the endowed properties. In the plaint as originally framed, there was no prayer for an injunction. Objection was, therefore, taken by the defendant to the effect that the suit was not maintainable in view of the proviso to section 42 of the Specific Relief Act. The plaintiff then amended the plaint and inserted the prayer for injunction to which reference has just been made. He valued the suit for the purposes of jurisdiction at Rs. 11,005, but for the purpose of payment of court-fees valued the prayer for injunction at Rs. 1,000. He then paid Rs. 10 as court-fees for the declaration under Schedule II, Art. 17 (*iii*), and Rs. 75 for the injunction under Schedule I read with section 7 (*iv*), (*d*) of the Court-fees Act, 1870. The suit was heard on the merits and dismissed. The plaintiff has appealed to this Court, and upon the memorandum of appeal, he has paid court-fees in the same manner as in the Court of first instance. It has been contended on behalf of the respondents that, under section 8 of the Suits Valuation Act, the valuation for the purposes of court-fees is identical with the valuation for the purpose of jurisdiction, and that, consequently, if the value assigned by the plaintiff for purpose of jurisdiction be accepted, the plaint and the memorandum of appeal are both insufficiently stamped, while, if the value assigned by the plaintiff for purposes of court-fees be accepted, the appeal lies to the District Judge and not to this Court.

Section 8 of the Suits Valuation Act provides as follows:—"Where in suits other than those referred to in the Court-fees Act, 1870, section 7, paragraphs V, VI and IX, and paragraph X, clause (*d*), court-fees are payable *ad valorem* under the Court-fees Act 1870, the

value as determinable for the computation of court-fees and the value for the purposes of jurisdiction shall be the same." The suit as framed falls within section 7, clause IV, sub-clause (c) of the Court-fees Act, 1870. Consequently, the value as determined for purposes of jurisdiction, namely, Rs. 11,005, must also determine the value for the purpose of payment of court-fees.

The same conclusion follows from another point of view. Section 7 (c) of the Court-fees Act provides that the amount of fee payable in suits to obtain a declaratory decree, where, as here, consequential relief is prayed, shall be determined according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. It was pointed out by this Court in the case of *Umatul Batul v. Nanji Koer*(1), that in cases falling under section 7 (iv) of the Court-fees Act, although the plaintiff is to state the amount at which he values the relief sought, the Legislature never intended that the plaintiff should be at liberty to assign any arbitrary value and thus be free to choose capriciously the *forum* of trial or appeal. The same view was taken in *Dayaram Jagjivan v. Gordhandas Dyaram* (2) and is implied in *Boidya Nath Adya v. Makhan Lal Adya* (3). In the case before us, there is no room for controversy that the prayer for injunction has been arbitrarily undervalued. The plaintiff contends that he is the sole *shebait* of the idol Lakhi Barahu Jiu, and is entitled, as such, to exclusive possession of the disputed properties, on behalf of the idol. He further contends that the principal defendant has been improperly placed in joint possession of the endowed properties under an erroneous order of the Revenue

1912  
RAJ  
KRISHN  
DEY  
v.  
BIPIN  
BEHARI DE

(1) (1907) 11 C. W. N. 705 ;

(2) (1906) I. L. R. 31 Bom. 73.

6 C. L. J. 427.

(3) (1890) I. L. R. 17 Calc. 680.

1912  
RAJ  
KRISHNA  
DEY  
v.  
BIPIN  
BEHARI DEY.

authorities made on the 6th May 1908. If he succeeds in these contentions, he will obtain exclusive possession of the endowed properties, of which according to his allegation he was in joint possession at the date of the commencement of the suit. The value of the prayer for injunction, therefore, is the value of the relief claimed by the plaintiff, and upon the facts stated that value, as estimated by the plaintiff himself, is Rs. 11,005. The plaintiff is, therefore, bound to pay *ad valorem* court-fees upon the plaint and memorandum of appeal, on the basis that the value of the relief claimed is Rs. 11,005. The court-fees payable upon Rs. 11,005 is Rs. 520; but the plaintiff has paid only Rs. 75; he is thus liable to pay the difference Rs. 445, both upon the plaint and the memorandum of appeal; he is accordingly directed to pay court-fees to the extent of Rs. 890 within three weeks from this date. If the amount is paid, the appeal will be heard. If it is not paid, the Court will consider what further order should be passed. The appeal will stand adjourned for three weeks.

The respondents are entitled to the costs of this hearing.

*Appeal adiourned.*

[The court-fee was paid, and the appeal heard on the merits: *see* next case. Ed.]

O. M.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Beachcroft.

RAJ KRISHNA DEY

v.

BIPIN BEHARI DEY.\*

1912

July 18.

*Religious Trust—Deed of endowment—Sole shebait—Appointment of new shebait in case of death—Appointment how to be made—Receiver pendente lite.*

Trusts will not be allowed to fail for want of a trustee, and, consequently, if the nominee dies before qualifying or afterwards, the Court will appoint a trustee.

*In re Orde* (1), *Re Ambler's Trust* (2), *Gunson v. Simpson* (3), *In re Smirthwaite's Trusts* (4) referred to.

Where a *shebait* is dead and there is no provision in the deed of endowment about the mode in which the office is to be filled up, the Court will not read into the deed of endowment a provision for appointment to the office of *shebait* which is not to be found therein. It becomes incumbent upon the representatives of the founders to make an appointment to the office of *shebait*, and upon failure to do so the Court has power to appoint a new trustee, and will exercise this power whenever there is a failure of a suitable person to perform the trust either from original or supervenient disability to act.

*Sital Das Babaji v. Protap Chandra Sarma* (5) referred to.

The appointment of a fit and proper person to be a new trustee is not a matter of arbitrary discretion of the Court. The appointment must be made subject to well known and defined rules.

*In re Tempest* (6) referred to.

Where a receiver appointed *pendente lite* was directed by the Subordinate Judge to continue to manage the properties on the scheme laid down in the deed of endowment, pending an agreement between the parties to appoint a *shebait* :—

\* Appeal from Original Decree, No. 118 of 1910, against the decree of Rajendra Nath Dutt, Subordinate Judge of Midnapore, dated Aug 23, 1909.

(1) (1883) 24 Ch. D. 271.

(4) (1871) L. R. 11 Eq. 251.

(2) (1888) 59 L. T. N. S. 210.

(5) (1909) 11 C. L. J. 2.

(3) (1868) L. R. 5 Eq. 332.

(6) (1866) L. R. 1 Ch. App. 485.

1912  
 RAJ  
 KRISHNA  
 DEY  
 v.  
 BIPIN  
 BEHARI  
 DEY.

*Held*, that the proper course to follow was, either to dismiss the suit, or, if the parties so desired, to appoint a *shebait* and place the properties in his hands. This latter order could be properly made only after amendment of the prayer in the plaint.

APPEAL by Raj Krishna Dey, the plaintiff.

The parties to the suit were originally members of a joint Hindu family governed by the Bengal School of Law. In 1887, one of the members of this family brought a suit for partition of all the joint family properties against the rest of the members. On the 5th December 1888, during the pendency of this partition suit, the parties filed a petition of compromise, and a decree in terms of the compromise was accordingly passed. Under the *solenamah* (deed of compromise) it was agreed, *inter alia*, that certain specified properties were to be set apart for the worship of the family deity and for the performance of various religious duties in connection with the worship, that the *shebait* was to manage the properties in the modes prescribed, to render accounts and to apply the income for the benefit of the endowment in the way defined in the instrument, that the *debutter* properties should for ever remain undivided, that one male member only of the family was to be appointed *shebait*, that should any *shebait* neglect the services of the deity, or cause any injury to the estate, the other co-sharers, or a majority of them, were to be competent to remove the *shebait* and to appoint another member of the family as *shebait*, who would be governed by the rules set out in the *solenamah*, and that one Nemai Chand Dey, a member of the joint family, was appointed the first *shebait*. No provision, however, was made for the succession to the office of *shebait* in the contingency of death of the first *shebait*. On the 5th December 1900, the parties to the petition of compromise executed and registered

a deed of endowment, or *arpannama*, embodying the terms of the *solenamah* and confirming the endowment previously intended to be created. Under this *arpannama* Nemai Chand Dey was to continue in his office of *shebait*. Nemai Chand Dey died on the 15th November 1907, and on the 7th February 1908 a majority of the co-sharers unanimously elected Raj Krishna Dey as *shebait* under the *arpannama* and duly executed a *neo.patra*, or deed of appointment, in his favour. Bipin Behary Dey, one of the sons of Nemai Chand Dey, however, did not join in this appointment, and, subsequently, got his name registered in the books of the Collector as a joint *shebait* along with Raj Krishna Dey. Thereupon, on the 10th July 1908, Raj Krishna Dey brought a suit against him for a declaration of his, the plaintiff's, title as sole *shebait*, for a declaration that Bipin Behary Dey was neither the exclusive nor a joint *shebait*, and for a declaration that the registration of the name of Bipin Behary Dey in the books of the Collector was illegal, and that he should be prohibited from interfering with the plaintiff performing his duties as *shebait* and managing the *debutter* properties, and made the rest of the members of the joint family *pro forma* defendants. This suit was dismissed by the Subordinate Judge, who held that the plaintiff was not lawfully appointed *shebait* of the idol, and that the proper procedure to follow was for the parties to agree to the appointment of a *shebait*. Pending such agreement, the Subordinate Judge placed the endowed properties in the hands of the receiver, who was originally appointed receiver *pendente lite*. The plaintiff, thereupon, appealed to the High Court.

1912  
RAJ  
KRISHNA  
DEY  
v.  
BIPIN  
BEHARI  
DEY.

*Babu Muhendra Nath Roy* and *Babu Hara Kumar Mitra*, for the appellant. There is no express

1912  
 RAJ  
 KRISHNA  
 DEY  
 v.  
 BIPIN  
 BEHARI  
 DEY.

provision in the *arpannama* for the appointment of a *shebait* in case of death, but there is a distinct provision that the office should be held by a single male member of the family. There is sufficient indication as to how the appointment should be made, and the power to make such an appointment has been duly exercised by the majority of the members of the family in favour of the appellant, who has been elected *shebait* under a deed of appointment, on which I rely.

*Babu Tarak Chandra Chukerbatty*, for the respondents, did not, at the suggestion of the Court, object to a suitable person being appointed *shebait*; and the case was remanded to the Court below.

MOOKERJEE AND BEACHCROFT JJ. This is an appeal on behalf of the plaintiff in a suit for declaration that he is the sole *shebait* of an idol Lakshmi Barahaji Thakur, and that the first defendant is not entitled to act as *shebait*, either jointly with him or separately. It appears that, on the 5th December 1888, in the course of a litigation between some of the present parties and the predecessors of the others, a petition of compromise was filed, by which the parties agreed to dedicate specified properties for the benefit of the idol. Under that petition of compromise one Nemai Chand Dey was appointed the first *shebait*. Twelve years later, on the 5th December 1900, the parties to the petition of compromise executed a deed of dedication, called an *arpannama*, by which the endowment previously intended to be created was confirmed. Under the *arpannama* Nemai Chand Dey was to continue as the *shebait* of the idol. It was further provided that, if the *shebait* was found guilty of neglect in the performance of the worship, or of causing any injury to the estate, the



other co-sharers, or a majority of them, would be competent to dismiss him and appoint another member of the family as a *shebait*. The modes in which the properties were to be managed, the accounts rendered and the income applied for the benefit of the endowment were also defined in this instrument. It was finally stated therein that the rules regarding the office of *shebait* would apply to the present *shebait*, as well as to the *shebait* who might succeed to that office in future. There was no provision made, however, for succession to the office of *shebait*; the parties contemplated the removal of a *shebait* by reason of default or misconduct; but they made no provision for the contingency, which was sure to happen, namely, the death of the first *shebait*. Nemai Chand Dey died on the 15th November 1907, and shortly afterwards the plaintiff obtained from the majority of the members of the family a *neogpatra* (or deed of appointment), whereby he was installed as *shebait* of the idol. The first defendant, one of the sons of Nemai Chand Dey, however, did not join in this appointment, and subsequently got his name registered in the books of the Collector as a joint *shebait* along with the plaintiff. Thereupon, on the 10th July 1908, the plaintiff commenced this action for declaration of his title as *shebait*, and for a further declaration that the defendant was neither the exclusive nor a joint *shebait*. The Subordinate Judge has held, that the plaintiff has not been lawfully appointed *shebait* of the idol. He has further held, that the proper procedure to follow is for the parties to agree to the appointment of a *shebait*. Pending such agreement amongst the representatives of the founders, the Subordinate Judge has by his decree placed the endowed properties in the hands of a receiver, who was originally appointed receiver *pendente lite*. The

1912

RAJ  
KRISHNA  
DEY  
c.  
BIPIN  
BEHARI  
DEY.

1912  
RAJ  
KRISHNA  
DEY  
v.  
BIPIN  
BEHARI  
DEY.

plaintiff has now appealed to this Court, and has argued that under the *arpannama* of the 5th December 1900 the representatives of the founder were competent, upon the death of the first *shebait*, to make an appointment to the vacant office, and that such power has been validly exercised in his favour by the majority of the members of the family under the *neogpatra* of the 7th February 1908. In our opinion there is no foundation for this contention.

As we have already stated, the founders omitted to provide for the contingency which has happened, and might easily have been foreseen. There is no provision in the *arpannama* of the 5th December 1900 for the devolution of the office of *shebait*, and, in circumstances like these, the Court will not read into the deed of endowment a provision for appointment to the office of *shebait*, which is not to be found therein. It was faintly suggested at one stage of the argument, that the clause which provides that the rules regarding the office of *shebait* shall apply to the then *shebait*, as well as to the *shebait* who might succeed to that office in future, was wide enough to meet the present contingency. It was fully realised by the appellant, however, that this provision was of no avail because the rule for the appointment of a successor to the office of *shebait* could not possibly apply to the then *shebait* who had been appointed as such twelve years previously. The position, therefore, is that the *shebait* is dead, and there is no provision in the deed of endowment about the mode in which the office is to be filled up. The principles applicable to a case of this description were formulated in the case of *Sital Das Babaji v. Protap Chandra Sarma* (1). These principles are threefold: *first*, the devolution of the trust upon the death or default of each trustee depends

upon the terms on which it was created, or the usage of the particular institution where no express trust deed exists: *secondly*, when the worship of an idol is founded, the office of *shebait* is vested in the heirs of the founder, in default of evidence to show that he has disposed of it otherwise; *thirdly*, where a *shebait* appointed by the founder fails to nominate a successor in accordance with the condition or usage of the endowment, the management reverts to the representatives of the founder, even though the endowment has assumed a public character. In the case before us, therefore, upon the death of the original *shebait* it became incumbent upon the representatives of the founders to make an appointment to the office of *shebait*. This they have failed to do, because they are not unanimous as to the person to be appointed. It cannot be held, that an appointment by the majority is valid in the absence of a provision in the deed of endowment to that effect. Consequently the Court is called upon to appoint a *shebait*. It cannot be disputed that the power of a Court to appoint a new trustee is very wide; it exists, and will be exercised, whenever there is a failure of suitable person to perform the trust, either from original or supervenient disability to act. It is an elementary principle that trusts will not be allowed to fail for want of a trustee, and, consequently, if the nominee dies, before qualifying or afterwards, the Court will appoint a trustee. If any authority is needed for this elementary proposition, reference may be made to the cases of *In re Orde* (1), *Re Ambler's Trusts* (2), *Gunson v. Simpson* (3), and *In re Smirthwaite's Trusts* (4). The appointment of a fit and proper person to be a new trustee is, however, not a matter of arbitrary discretion of the

1912  
 RAJ  
 KRISHNA  
 DEY  
 v.  
 BIPIN  
 BEHARI  
 DEY.

(1) (1883) 24 Ch. D. 271.

(3) (1868) L. R. 5 Eq. 332.

(2) (1888) 59 L. T. N. S. 210.

(4) (1871) L. R. 11 Eq. 251.

1912  
 RAJ  
 KRISHNA  
 DEY  
 v.  
 BIPIN  
 BEHARI  
 DEY.

Court. The appointment must be made subject to well known and defined rules. These rules are stated in *In re Tempest* (1) where Lord Justice Turner formulated the following three principles: *first*, the Court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument creating the trust, or clearly to be collected therefrom; *secondly*, that the Court will not appoint a trustee with a view to the interest of some of the persons, beneficially interested under the trust, in opposition either to the wishes of the founders, or to the interest of the other *cestuis que trusts*; and, *thirdly*, that the Court, in appointing a trustee, will have regard to the question, whether the appointment will promote or impede the execution of the trust, for the very purpose of the appointment is that the trust may be better carried into execution. In the case before us, the deed of appointment makes it clear that the founders had two things in view: *first*, that there should be only one *shebait*; and, *secondly*, that the *shebait* should belong to the family which had founded the endowment. Consequently, in appointing the next *shebait*, the Court will select the most suitable person amongst the members of the family. But the materials on the record are not sufficient to enable us to make an order in this behalf.

The result is that this appeal is allowed, the decree of the Subordinate Judge discharged, and the case remitted to him, in order that he may appoint a suitable person from amongst the members of the family of the founders as the next *shebait*.

We may point out, that the Subordinate Judge had no authority to place the endowed properties permanently in the hands of a receiver. If, in his opinion, the plaintiff was not validly appointed *shebait*, the

proper course to follow was, either to dismiss the suit, or, if the parties so desired, to appoint a *shebait* and place the properties in his hands. This latter order could be properly made only after amendment of the plaint. The plaintiff has accordingly asked for permission to amend the plaint by the insertion of an additional prayer clause to the following effect: that if the title of the plaintiff as *shebait* under the *arpannama* be held invalid, the Court may appoint a suitable person as *shebait*. This application is not opposed by the respondent, and is granted. The plaint will be amended accordingly.

The costs of this litigation up to the present stage will be borne by the parties themselves; the costs subsequent to the remand may, if the Subordinate Judge so directs, be paid out of the estate.

O. M.

*Appeal allowed; case remanded.*


---

### CIVIL RULE.

---

*Before Mr. Justice Brett and Mr. Justice Chapman.*

VISMADEV DAS

v.

SITA NATH ROY.\*

1912

Aug. 14.

*Transfer—Appeal—Powers of Court to whom case is transferred for trial—  
Limitation—Practice.*

When an appeal has been transferred for trial by a District Judge to a Subordinate Judge, the Subordinate Judge has, for the purpose of disposing of the appeal, under the Bengal, North-Western Province and Assam Civil Courts Act, all the powers which could be exercised by the District Judge.

\* Civil Rule, No. 5901 of 1911, against the order passed by S. C. Ganguli, Subordinate Judge of Faridpur dated Aug. 9, 1911.

1912

RAJ  
KRISHNA  
DEY  
v.  
BIPIN  
BEHARY  
DEY.

1912  
 ———  
 VISMADEV  
 DAS  
 v.  
 SITA NATH  
 ROY.

Where, therefore, an appeal was presented to the District Judge after the period of limitation, owing to a mistake of law as regards the appealability of the suit, and the District Judge admitted the appeal under s. 5 of the Limitation Act and transferred the appeal to the Subordinate Judge for disposal, the Subordinate Judge has power to consider whether the appeal was competent or barred by limitation.

*Jhotee Sahoo v. Omesh Chunder Sircar* (1) not followed.

CIVIL RULE obtained by the auction-purchaser and appellant in the appeal in connection with which this Rule was issued.

The petitioner in this Rule, a stranger, purchased certain lands in execution of a mortgage-decree held at the instance of the decree-holder, the mother of the opposite party. Thereupon, the father of the opposite party, alleging that he was a puisne mortgagee, applied for setting aside the sale under O. XXI, r. 89 of the Civil Procedure Code. The mother of the opposite party, the decree-holder, upon certain other allegations applied for setting aside the sale under O. XXI, r. 90. Before these applications were disposed of, both the father and the mother of the opposite party died, and he got himself substituted in both the applications and wanted to prosecute both of these. The petitioner in this Rule objected. The first Court overruled the objections, and held that the opposite party was competent to maintain both the applications. The Court, however, granted the application under O. XXI, r. 89, and set aside the sale, and kept the other application pending. The petitioner moved the High Court and a rule was issued, but at the final hearing the rule was discharged on the ground that, under the new Civil Procedure Code, the auction-purchaser was competent to appeal against the order setting aside the sale. Thereupon, the petitioner filed an appeal in the Court of the District Judge against

the order setting aside the sale. As the appeal was filed out of time, the District Judge called upon the petitioner to show cause why the appeal should not be dismissed, but after hearing the appellant's arguments, supported by an affidavit, and considering the special circumstances of the case, he admitted the appeal under section 5 of the Limitation Act, and thereafter transferred the appeal for disposal to the Subordinate Judge. At the final hearing, the Subordinate Judge allowed the respondent to raise a preliminary objection that the appeal must fail, as it was filed out of time, and dismissed the appeal on that ground. The present petitioner then moved the High Court against the order on the ground that the Subordinate Judge had no jurisdiction to consider the question of limitation, whereupon this Rule was issued.

1912  
 ———  
 VISMADEV  
 DAS  
 v.  
 SITA NATH  
 ROY.

*Babu Prakash Chandra Majumdar*, for the petitioner. The Subordinate Judge had no jurisdiction to re-open the question of limitation already decided by the District Judge: *Jhotee Sahoo v. Omesh Chunder Sircar* (1). See also *Manick Dukandar v. Naibulla Sircar* (2), which really follows the last mentioned case, and only lays down further that where the District Judge appears to have admitted an appeal without being satisfied whether there were good grounds for extension of time, the Subordinate Judge to whom the case is transferred for trial may dismiss the appeal on that ground. *Bishendut Tewari v. Nandan Pershad Dubay* (3) and similar other cases relating to the different Division Benches of the same High Court are not applicable. Apart from the authority of *Jhotee Sahoo's Case* (1), the Subordinate Judge had no new facts and circumstances

(1) (1879) I. L. R. 5 Calc. 1.

(2) (1898) 2 C. W. N. 461.

(3) (1907) 12 C. W. N. 25

1912  
 VISHMADEV  
 DAS  
 v.  
 SITA NATH  
 ROY.

placed before him which could justify him in coming to a diametrically opposite conclusion to that of the superior Court. Finally, any order passed under section 5 of the Limitation Act is not defective on the ground of being *ex parte*. The respondent cannot claim any right of hearing, as the language of the section "when the *appellant* satisfies the Court" would indicate.

*Babu Mohinimohan Chatterji*, for the opposite party. *Jhotee Sahoo's Case* (1) is no longer good law. It was decided before the present Civil Courts Act (XII of 1887). Section 22 (3) has been newly added, giving the same powers to the Court of the Subordinate Judge to which the appeal is transferred. In this suit the Subordinate Judge's Court would be practically the same as the District Judge's Court. Hence the principle of *Bishendut Tewari v. Nandan Pershad Dubay* (2) and similar cases would apply. Lastly, the order having been passed *ex parte*, was subject to revision: *Moshaullah v. Ahmedullah* (3), *Surat Chander Bose v. Saraswati Debi* (4). The Bombay and Madras High Courts also have held that Subordinate Judges can revise such *ex parte* orders.

*Babu Prakash Chandra Majumdar*, in reply. Section 22 (3) of Act XII of 1887 did not introduce any new principle. The actual words used in the section were "the same rules shall apply," and not that the same powers were given. In fact a glance at other sections, *e.g.*, 3, 21 and 22 would show that the Court of the District Judge is still a superior Court, and in no suit can it be said to be the same Court as the Subordinate Judge's. As such *Jhotee Sahoo v. Omesh Chunder Sircar* (1) is still good law, and the other cases do not apply.

(1) (1879) I. L. R. 5 Calc. 1.

(2) (1907) 12 C. W. N. 25.

(3) (1886) I. L. R. 13 Calc. 78.

(4) (1907) I. L. R. 34 Calc. 216.



BRETT AND CHAPMAN JJ. The petitioner in the present Rule appealed to the Court of the District Judge of Faridpur against a decision passed against him by the Munsif of that district. The appeal was presented to the District Judge considerably after the period of limitation ; but the petitioner when presenting the appeal represented that, owing to an error in law, he had, instead of appealing to the District Judge, applied to this Court in revision, and that, owing to the delay in the disposal of that application and also to a mistake which he fell into as to the result of that application, he was not aware of the true facts until the end of January 1911. He filed his appeal on the 13th February 1911. The District Judge, on a consideration of the facts represented by the petitioner, admitted the appeal under section 5 of the Limitation Act. Afterwards the appeal was transferred to a Subordinate Judge for disposal. The Subordinate Judge, after issuing notices to the respondent and hearing the preliminary objection which they seem to have taken to the competency of the appeal on the ground that it was presented after the period of limitation, came to the conclusion that in fact the appeal was barred by limitation at the time when it was preferred, and therefore he dismissed it. The petitioner then applied to this Court for a Rule on the opposite party to show cause why the decree of the Subordinate Judge should not be set aside. In passing the order for the issue of the Rule, the learned Judges of this Court remarked as follows :—  
 “The applicant appears to have a decision in *Jhotee Sahoo v. Omesh Chunder Sircar*(1) in his favour. We, out of deference to that decision, issue a Rule calling on the other side to show cause why the decree of the Appellate Court should not be set

1912  
 VISHMADEV  
 DAS  
 v.  
 SITA NATH  
 ROY.

(1)(1879) I. L. R., 5 Calc 1.

1912  
VISHNUPAD  
DAS  
v.  
SITA NATH  
ROY.

aside on the ground that the Subordinate Judge had no jurisdiction to decide whether or not the appeal was within time." The main ground which was advanced in support of the application and which has now been pressed before us in support of this Rule is that, after the District Judge had, by his order passed under section 5 of the Limitation Act, admitted the appeal, the Subordinate Judge had no jurisdiction to set aside that order and to dismiss the appeal on the ground that it was barred by limitation at the time when it was admitted. We have referred to the decision of this Court in the case of *Jhotee Sahoo v. Omesh Chunder Sircar* (1) on which the petitioner relies. That judgment, no doubt, supports the contention that, after the District Judge has, by an *ex parte* order, directed that an appeal be admitted, a Subordinate Judge, to whom the appeal has been transferred, is not competent to revoke the order of the District Judge. The learned pleader who appears to oppose this Rule has invited our attention to the fact that the learned Judges who decided that case remarked that, where an appeal had been admitted on the *ex parte* statements of the appellant, because at that time the respondent had not entered appearance, still, on a proper cause being shown, such an *ex parte* order was liable to be cancelled by the Court which passed it. This is the view which has been adopted and accepted by this Court in similar cases where appeals have been admitted by an *ex parte* order of a Division Bench, and the propriety of the order has subsequently been brought into question before the Bench trying the appeal. This Court has invariably held that the Bench trying the appeal is not bound by the order of the Bench which admitted the appeal by an order passed under section 5 of

the Limitation Act. The learned pleader, who appears for the opposite party, has also drawn our attention to the fact that the decision of this Court in *Jhotee Sahoo v. Omesh Chunder Sircar* (1), was passed in 1879 before the Bengal, North-Western Provinces and Assam Civil Courts Act was passed in 1887, and he relies on clause (3) of section 22 of the said Act to support the contention, that, when an appeal has been transferred for trial by a District Judge to a Subordinate Judge, the Subordinate Judge has, for the purpose of disposing of the appeal, all the powers which could be exercised by the District Judge. It has not been disputed before us that, in a case like the present, the District Judge would, on further cause being shown by the respondent, have had the power to revoke the order passed by him under section 5 of the Limitation Act. We see no reason to hold why, under the provisions of the Civil Courts Act, similar powers should not be considered to have been given to a Subordinate Judge trying the appeal. The view taken by this Court in the case of *Jhotee Sahoo v. Omesh Chunder Sircar* (1) does not appear to have been followed in the other High Courts in India, nor does it appear to have been accepted as a rule in this Court after the passing of the Civil Courts Act. In these circumstances, we are of opinion that the decision on which reliance is placed by the petitioner and with reference to which the Rule was issued, is not a sufficient authority to support the conclusion that, in the present case, the order of the Subordinate Judge dismissing the appeal is not in accordance with law. The result must, therefore, be that the Rule is discharged with costs.

S. M.

*Rule discharged.*

1912  
VISMADDEV  
DAS  
v.  
SITA NATH  
ROY.

**APPEAL FROM ORIGINAL CIVIL.**

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and  
Mr. Justice Woodroffe.*

1912  
Aug. 22.

JOSHUA

*v.*

ARAKIE.\*

*Jewish law—Marriage custom —“ Ketuba,” legal effect of—Rights of wife.*

In a suit brought by a Jewish lady married in Calcutta, for the recovery from her deceased husband's estate of the sum mentioned in a *ketuba*, executed on the occasion of their marriage :—

*Held*, that the *ketuba* was a necessary but formal incident of the marriage contract and ceremonial, and created no such right in favour of the widow.

APPEAL by the plaintiff, Mozelle Joshua, from the judgment of Harington J.(1)

On the 8th December 1907 the plaintiff married Aaron Raphael Joshua, both being of the Jewish faith, at Calcutta, and on the occasion of the marriage an instrument called a *ketuba* was executed, of which the following is a translation :—

“On Sunday, the 3rd day of the month of Tabeth in the year 5668 from the creation of the world that we are counting here in the town of Calcutta which is situated and lying on the bank of river Ganges which is running to the big sea, How Mr. Aaron the son of Raphael Joshua spoke to this woman Muzzaltobe daughter of Jacob Ezackial Hakam Moses to be my wife in accordance with the law of Moses and Israel and I by the help of the Almighty will serve and respect provide feed and clothe you in accordance with the usage of Jewish gentlemen who are serving respecting providing feeding and clothing their wives in the best manner and we allow you endowment (*mohrana*) with oath I establish from my own money one

\* Appeal from Original Civil No. 56 of 1911.

hundred silver which are allowed to you by the Rabbis and your food clothing and your requirements and I will visit you in the way of the world and the said bride has acceded and became his wife according to the Law of Moses and Israel and that she brought to her husband ornaments of gold and silver and dresses etc. totalling to Rs. 5,000 which he has accepted and wrote upon himself on the former and the latter also in all Rs. 5,000 : and he further agreed to add out of his money an addition on the principal of this edict Rs. 455 in all together with the endowment additions and gifts Rs. 10,555 and Mr. Aaron acknowledged that the abovementioned sums are received and accepted by him and under his command and he acknowledged that the said sums are as lent to him and he possessed the same and like the trade of goat and iron should it increase and decrease will be sustained by him and accordingly the said Mr. Aaron told us that the security and the responsibility of this edict the endowment and the addition which are stipulated for her accepted and agreed by me and my heirs after me from all my properties and also moveable and not moveable will be security and pledge to realize from the best of my woven goods and landed properties which I have under the heaven and that I may possess hereafter and even from the robe that is on my shoulders during my existence and after my existence from this day and for ever and security and responsibility and the strength as of all other edicts the endowment and addition as are in custom with the daughters of Isreal also 4 umnia (measurement) of ground as worthy and as it is ordered by our Rabbis. Not like a support and not like a draft to be considered this on cancelling all sorts of previous understandings in the world and in rejecting all evidences and oaths. We the undersigned are witnessing that all aforesaid are spoken by the said Mr. Aaron to Muzzaltobe his this bride his wife trust all that are written above and explained with solemn oath and complete. To purchase with the valuable articles. All those mentioned above are correct right firm and true.

I accept those mentioned above.

AARON RAPHAEL JOSHUA.

*Witness.*

RAHIM MOSEL COHEN.

*Witness.*

DAVID AELIA DAVID JOSEPH EZRA."

Aaron Raphael Joshua died intestate on the 5th March 1908, leaving him surviving the plaintiff his widow, and the defendant Sophie Arakie his daughter by a previous wife.

Letters of administration to the estate and effects of the deceased were obtained by the Administrator-General of Bengal on the 18th June 1908. The assets

1912

JOSHUA  
v.  
ARAKIE.

1912  
JOSHUA  
v.  
ARAKIE.

consisted of Government securities of the value of about Rs. 29,000, and claims were preferred by creditors against the estate to the extent of about Rs. 70,000.

On the 11th November 1908 the widow instituted this suit claiming under the *ketuba*, which she described as a marriage settlement, the sum of Rs. 10,555 as a first charge on her husband's estate, contending that he "had charged his property with the payment to the plaintiff of the said sum being sums settled granted or given by way of dower or gifts to the plaintiff by the said deceased in consideration of the marriage of the plaintiff with the deceased."

Sophie Arakie and the Administrator-General of Bengal were made defendants in the suit. It was contended by the former that the instrument did not operate as a charge, and that "the execution of an instrument of this form and nature is by Jewish custom a part of the marriage ceremony and nothing more, that the mention of money or property therein is merely nominal, and no money or property is really forthcoming as intended to be given settled or secured."

The suit came on for hearing before Harington J., and was dismissed by his Lordship on the 9th June 1911 (1).

From this judgment the plaintiff appealed. On the 6th March 1912, when the appeal was first opened before the Appellate Court, an adjournment was granted to enable the parties to adduce further evidence in the shape of appropriate books of reference or affidavits of acknowledged authorities in support of their rival contentions. These books and affidavits were now placed before the Court of Appeal.

*Mr. B. Chakravarti* (with him *Mr. A. N. Chaudhuri*), for the appellant, referred to certain affidavits, and to the text-books : *Milzinia on Divorce*, pp. 85, 86, 87, *Ambler*, and the *Jewish Encyclopædia*. The preponderance of authority is in favour of the appellant. The opinions of authorities are relevant under section 50 of the Evidence Act. Dr. Gaster's opinion is that the right arises out of the relationship between the parties. The instrument is evidence of the amount. According to Dr. Gaster, even if the wife does not in fact bring in any money, the husband is not absolved from liability for the sum mentioned in the instrument. The Indian Succession Act does not interfere with customary law. The instrument creates a charge on the husband's estate.

*Mr. S. R. Das* (with him *Mr. Hyam*), for the respondent, *Sophie Arakie*. The *ketuba* is merely an archaic incident of the Jewish marriage ceremony, and has no legal effect. The recitals in the instrument have no foundation on fact : the figures are fictitious. There is no evidence that these instruments are enforceable. Jews are governed by the ordinary municipal law.

*Mr. Hyam* (following). This Court has no jurisdiction to administer Jewish law : *Musleah v. Musleah*(1). The *ketuba* is an instrument connected with the marriage ceremony, and must be construed according to the law of the domicile of the parties, which is British Indian : *Story on Conflict of Laws*, 7th edition, clauses 110, 113. The instrument purports to be a declaration by two witnesses, and admitted by the husband. According to the evidence, the declarants signed the instrument without knowing its contents. Such an instrument can have no legal effect.

1912  
JOSHUA  
v.  
ARAKIE.

1912  
JOSHUA  
v.  
ARAKIE.

*Mr. J. E. Bagram*, for the Administrator-General of Bengal. The instrument cannot be said to constitute a declaration of trust. Nor can it constitute a charge on the husband's estate : such a charge is unknown to English law.

*Mr. Chakravarti*, in reply. The law of contract allows a provision in consideration of marriage.

*Cur. adv. vult.*

JENKINS C.J. The plaintiff, Mozelle Joshua, is the widow of Aaron Raphael Joshua ; and she has brought this suit to establish her right to Rs. 10,555 under an instrument, which she describes as a marriage settlement or *ketuba*. The defendants are Sophie Arakie, Aaron Raphael Joshua's daughter by a former wife, and the Administrator-General of Bengal, his representative under a grant of letters of administration.

This *ketuba* came into existence on the marriage of the plaintiff with the deceased. A translation of it is annexed to the plaint.

It opens with a narration of the bridegroom's proposal to the bride, his promise to feed and clothe her and endow her with 100 pieces of silver, her acceptance of his proposal, and their marriage.

Then it is said the bride brought to her spouse "ornaments of gold and silver and dresses totalling to Rs. 5,000 which he has accepted and wrote upon himself on the former and the latter also, in all Rs. 5,000. And he further agreed to add, out of his money, an addition on the principal of this edict Rs. 455, in all together with the endowment, additions and gifts Rs. 10,555. And Mr. Aaron acknowledged that the abovementioned sums are received and accepted by him and under his command. And he acknowledged that the said sums are as lent to him and he possessed the same and like the trade of goat



and iron should it increase and decrease will be sustained by him."

The instrument then concludes as follows :—

"And accordingly the said Mr. Aaron told us that the security and the responsibility of this edict the endowment and the addition which are stipulated for her accepted and agreed by me and my heirs after me from all my properties and also moveable and not moveable will be security and pledge to realize from the best of my woven goods and landed properties which I have under the heaven and that I may possess hereafter and even from the robe that is on my shoulders during my existence and after my existence from this day and for ever and security and responsibility and the strength as of all other edicts the endowment and addition as are in custom with the daughters of Israel also 4 umma (measurement) of ground as worthy and as it is ordered by our Rabbis. Not like a support and not like a draft to be considered this on cancelling all sorts of previous understandings in the world and in rejecting all evidences and oaths. We the undersigned are witnessing that all aforesaid are spoken by the said Mr. Aaron to Muzalltobe his this bride his wife trust all that are written above and explained with solemn oath and complete. To purchase with the valuable articles. All those mentioned above are correct right firm and true."

It was signed by two witnesses, and there is a written statement by the bridegroom accepting what was mentioned in the document.

Though the translation leaves much to be desired, the general drift of the instrument is clear.

The question for our determination is whether it was intended to operate as an effective legal instrument, entitling the plaintiff to recover Rs. 10,555 on her husband's death. Harington J. decided adversely

1912

JOSHUA

v.

ARAKIE.

JENKINS C.J.

1912  
JOSHUA  
v.  
ABAKIE.  
JENKINS C.J.

to the plaintiff, and so she has preferred this appeal.

When the appeal was first opened before us, both sides sought an opportunity of obtaining further authorities in support of their rival contentions. As the case was one of first impression, at least in this Court, and of considerable importance to the Jewish community in Calcutta, we, by consent of parties, allowed an adjournment, and gave each side permission to adduce further evidence in the shape of appropriate books of reference or affidavits of acknowledged authorities with a view to showing whether or not an instrument such as this *ketuba* was ordinarily intended to have legal operation on the husband's death.

Affidavits have been placed before us on both sides, but they do not meet the point on which we desired assistance.

Text-books too have been procured, but they are of historical rather than of practical interest.

On a consideration of the materials on the record I am convinced that the *ketuba* is a necessary incident of a marriage contract in Calcutta between those of the Jewish faith.

And though it is expressed in terms that suggest pecuniary endowment, yet according to modern ideas and modern practice this expression (in my opinion) is not intended to have the legal consequences for which the plaintiff contends.

A solemn declaration of endowment, forming a part of the marriage ceremonial but leading to no practical result, is not unknown, and I see no difficulty in the way of regarding the *ketuba* as a survival, which is now a mere formality and nothing more.

This view gains support from the fact established in this case, that what is recited did not in truth occur;

and the evidence shows that though the instrument purports to be an assertion by the witnesses of their actual experience, they both signed the document in ignorance of its contents. And then again it is a significant circumstance that no instance is recorded in the evidence or disclosed in any reported case where a *ketuba* has been treated as creating a right to recover the sums mentioned in it.

The present suit is based on the *ketuba* and on that alone, so that I refrain from considering the problem whether a Jewish widow has any rights of dower. Nor do I intend to express any opinion as to her rights in the event of divorce.

I propose to deal only with that which is before us, the right of a Jewish widow married in Calcutta to sue on her husband's death for the sums mentioned in the *ketuba*, and on that my opinion is that the plaintiff has failed to establish her claim, and I would therefore dismiss this appeal with costs.

WOODROFFE J. I agree.

*Appeal dismissed.*

Attorney for the appellant: *N. C. Bose.*

Attorneys for the respondents: *O. C. Ganguly & Co.;*

*R. Westmacott.*

J. C.

1912  
JOSHUA  
v.  
ARAKIE.  
JENKINS C.J.

## PRIVY COUNCIL.

TRIPURARI PAL

v.

JAGAT TARINI DAS.

P.C.<sup>c</sup>  
1912

Oct. 31.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

*Hindu Law—Will—Construction of will—Period of distribution of property bequeathed—Succession Act (X of 1865), s. 111—Hindu Wills Act (XXI of 1870)—Absolute gift to son on attaining majority—Bequest contingent on son's death which did not happen till after period of distribution.*

The right of the appellant to succeed to the *shebaitship* of certain *debutter* properties depended on the construction of his grandfather's will, and on the nature of the right which his father took in those properties. After declaring the properties to be *debutter* for the maintenance of the family idol, the testator in his will stated that "my present begotten son" (the appellant's father) "will be *shebail* for performance of the ceremonies." And after making provision for his own death during the minority of his son, in which case his widow was to be the *shebail* as his son's guardian, the testator continued, "and my son on attaining majority will personally conduct the work of the *shela*. God forbid, if during my life or after my death, my said son dies, then my widow will be the *shebail*, and after her my daughters by her" (the respondents) "will be *shebails* . . . . . Moreover, for carrying out the directions under this will until my minor begotten son comes of age, my wife" (and two male persons named "will be executors : . . . . . and on my said begotten son attaining majority the said executors will be discharged, and the said son by continuing in his present faith will go on performing the *sheba*, etc., of the said idol :

*Held* (reversing the decision of the High Court), that, on the true construction of the will, there was an absolute gift of the *shebaitship* to the appellant's father on his attaining his majority, and it was not cut down by anything that followed. There were provisions in case of his death as a minor, but no cutting down of the absolute gift to him. The appellant

<sup>c</sup> *Present* : LORD MACNAGHTEN, LORD MOUTON, SIR JOHN EDGE AND MR. AMEER ALI.

therefore, and not the respondents, succeeded on the death of the testator's son, who had attained his majority and held the *shebaitship* until his death.

APPEAL from a judgment and decree (19th August 1907) of the High Court at Calcutta, which reversed a judgment and decree (20th September 1905) of the Court of the Subordinate Judge of Nadia.

1912  
TRIPURARI  
PAL  
v.  
JAGAT  
TARINI DAS.

The plaintiff was the appellant to His Majesty in Council.

The only question for determination on this appeal was as to the true construction of the will of one Shib Chandra Pal, dated 20th February 1883 (9th Falgun 1289), under which his grandson, the plaintiff, claimed to be entitled to possession of certain *debutter* properties as the *shebait* of the idol Lakshmi Janardan.

The testator died in *Pous* 1290 (December 1883 or January 1884), leaving a widow Brajamati Dasi, a son Mukunda Murari Pal, two daughters Nistarini and Jagat Tarini, and an adopted son Jadunath (who however had relinquished his rights, and admittedly was not entitled to any of the property in suit). By the will the property in dispute was declared to be *debutter* for the maintenance of the family idol, and by the terms of the will Mukunda Murari Pal was to be *shebait* of the idol on attaining his majority.

At the time of his father's death Mukunda Murari Pal was a minor aged three years and three months, and during his minority his mother, Brajamati Dasi, conducted the worship of the idol and acted as *shebait*. Probate of the will was granted to the two executors Ram Chandra Gangopadhya and Bhusan Chandra Pramanick, and to the executrix Brajamati Dasi, by the District Court of Nadia on 21st March 1886. The two executors died in 1899 and 1903, respectively.

Mukunda Murari Pal attained his majority in October 1897, and he then took possession of his

1912  
 TRIPURARI  
 PAL  
 v.  
 JAGAT  
 TARINI DAS.

father's estate and acted as sole *shebait*, and as such held possession of the *debutter* properties up to the date of his death. He died on 22nd Kartick 1307 (November 1900), leaving his son Tripurari Pal, a minor, and his widow, respectively, him surviving. On his death Brajamati Dasi again took possession of the estate and of the *debutter* properties, and acted as *shebait* thereof.

On 5th September 1904 the plaintiff (now appellant) by his next friend filed the suit, out of which the present appeal arose, against Brajamati Dasi, Nistarini and Jagat Tarini (now respondents); and other persons were, on the death of Brajamati Dasi, shortly after the institution of the suit, substituted for her on the record, namely, the sons of one of the other executors, both of whom had died.

The plaintiff in his plaint claimed that the defendants had no right to the *shebaitship*, or to the *debutter* properties, or to the estate of the testator under the will; and that the sole right thereto had vested absolutely in his father. Mukunda Murari Pal, on his attaining majority, and on the subsequent death of his father became vested in him (the plaintiff) as his heir. He prayed, *inter alia*, for possession of the properties, for accounts, and for costs.

The defendants denied the plaintiff's right to the *debutter* properties or to the *shebaitship*, and claimed that under the terms of the will they were entitled to them. No defence was raised as to the plaintiff's right to the properties other than those which were *debutter*, and which formed the estate of the testator, and no question now arose on this appeal in regard thereto.

The following was the material portion of the will to be construed:—

“My present begotten son Mukunda Murari will be *shebait* for the performance of those ceremonies. If during the minority of the said

Mukunda Murari Pal I die, then my second wife Srimati Brajamati Dasi, who gave birth to Mukunda Murari, will be *shebait* as his guardian, during the time of the said Mukunda Murari's minority, and Mukunda Murari, on attaining majority, will personally conduct the work of the *sheba*. God forbid, if during my life time or after my death, the said Mukunda Murari dies, then the said Brajamati Dasi will be *shebait*, and, after her death, Srimati Nistarini Dasi and Srimati Jagat Tarini Dasi, daughters born of the said Brajamati Dasi and of my loins, will be *shebaits*. And if the said Brajamati Dasi dies during the minority of the said Nistarini Dasi and Jagat Tarini Dasi, the guardians of the said Nistarini Dasi and Jagat Tarini Dasi for the time being will conduct the said work of the *sheba*, and no *shebait* shall have power to make a gift or sell, or waste or destroy, or transfer by mortgage, etc., the property of the said idol, beyond carrying on the work of the *sheba*. Moreover, for carrying out the directions under this will, till my minor begotten son Mukunda Murari comes of age, my wife the said Brajamati Dasi, Srijukta Ramkanai Goswami and Ram Charan Gangopadhya of Santipur, and my son-in-law Srijukta Bhusan Chandra Pramanik of Haripur, will be executors, and all or most of the executors, after settling how the work of the *sheba* will be carried on, will have the work of the *sheba* performed by Srimati Brajamati Dasi . . . . . and on my said begotten son Mukunda Murari Pal attaining majority the said executors will be discharged and the said Mukunda Murari Pal, by continuing in his present religious faith, will go on performing the *sheba*, etc., of the said idol."

The Subordinate Judge held that on the proper construction of the will the plaintiff was entitled to act as *shebait* of the *debutter* properties, and he made a decree in his favour for possession of them. The Subordinate Judge, after reading the above extract from the will, said :—

"The above extract, together with the fact that a former will in favour of the adopted son was revoked on the birth of a natural son and the general tenor of the will, shows that the testator was anxious to preserve his properties intact in his direct male line, and had no intention to allow it to pass to strangers. It was with this intention that he purposely made no arrangement for the management of the property after the natural son attaining his majority. For the will stops short upon the happening of that contingency. The *shebaitship* not being otherwise disposed of, the property should pass to the plaintiff, who is the direct heir of the original donor and testator. Again, the earlier portion of the will contemplates the death of Mukunda Murari *before attaining his majority*. Though the

1912

TRIPURARI  
PAL  
v.  
JAGAT  
TARINI DAS.

1912  
 TRIPURARI  
 PAL  
 v.  
 JAGAT  
 TARINI DAS.

language used in the will, if strictly construed, does not bear out that limited interpretation, yet the insertion of the clause in the place it stands and the possibility of the widow's death during the minority of her daughters, amply supports that theory. It could never have been the intention of the testator to deprive and divest his direct legal heirs, the sons of his natural son Mukunda, in the manner suggested by the defendants. Under the above circumstances, the proper interpretation of the provision of the will for appointment of the widow, and, after her death, of the daughters as *shebait*s in succession to Mukunda Murari was that the above should come to effect should Mukunda die a minor, unmarried and childless."

From this decision the defendants appealed to the High Court, the only ground raised by them relating to the construction of the will in reference to the *shebaitship* and the *debutter* properties.

The High Court (RAMPAINI, *Acting* C. J., AND SHARFUDDIN J.), in reversing the decree of the Subordinate Judge, said:—

"The plaintiff's pleader urges that the provision that the widow was to become *shebait* would only apply, if Mukunda Murari died before attaining majority, and that according to the will Mukunda, on attaining majority, became absolute owner of the *shebaitship*.

"We are unable to agree to these contentions of the plaintiff's pleader. They can only be supported by importing into the will words which do not occur there, and an intention on the part of the testator which cannot, we think, be gathered from the will.

"The testator, it seems to us, was anxious to provide, *not* for the descent of his property to his son and his son's heirs, but for the maintenance and worship of his family idol, with a view probably to his own spiritual benefit. If he had wished his property to descend to his son and his son's heirs as the family is one governed by the Dayabhaga Law, he had only to make no will at all. The fact of his making a will showed that he had another object in view. Then, the will nowhere gives the son Mukunda Murari an absolute right to the *shebaitship* on attaining majority. We consider he had only under the will a right to the *shebaitship* for his life. Nor does the will provide that it is only if Mukunda Murari dies before attaining majority that the widow is to succeed as *shebait*. The testator says, 'God forbid, if during my life time or after my death, the said Mukunda Murari dies.' This does not seem to us to mean 'if the said Mukunda Murari dies when a minor.'



"The testator had already provided for the case of his dying and Mukunda Murari being then a minor, and in the words immediately preceding this extract he had provided for the case of his dying leaving Mukunda a minor, and of Mukunda subsequently becoming a major, when he was at once to become *shebait*, apparently for his life. So that when the testator says 'God forbid, etc', he must rather have had in his mind the contingency of Mukunda being a major than of his being still a minor.

"We, therefore, cannot interpret the will as the Subordinate Judge has interpreted it, or as the plaintiff's pleader invites us to do. We are of opinion that the will is an imperfect will. The testator thought only of the worship of his family idol and of arranging for its worship by the members of his family who survived him. He did not contemplate or provide for what was to happen after they had all died, or perhaps he intended that in that case the *shebaitship* should descend according to the ordinary law of inheritance applicable to the family. However this may be we have only to apply the terms of the will to existing circumstances.

"When the plaintiff instituted his suit, the testator's widow, Brajamati Dasi, was alive. While she lived, the plaintiff had no right to the *debutter* property. She is now dead, but the right of *shebait* devolves on the defendant Jagat Tarini and her sister Nistarini."

On this appeal, which was heard *ex parte*,

A. M. Duane, for the appellant, contended that, on the true construction of the will, the appellant's father Mukunda Murari Pal took an absolute estate in the properties in dispute on the death of the testator: and that the title to the *shebaitship* and the *debutter* properties passed to the appellant on the death of his father. The testator only intended that Brajamati and the respondents should take the properties and the *shebaitship* in the event of the appellant's father dying before he attained his majority. The gift over to the respondents never took effect, as Mukunda Murari Pal did attain his majority. Reference was made to *Norendra Nath Sircar v. Kamalbasini Dasi* (1); and section 111 of the Succession Act (X of 1865) which was extended to Hindu wills by the Hindu Wills' Act (XXI of 1870).

(1) (1896) I. L. R. 23 Calc. 563 ; L. R. 23 I. A. 18.

1912  
TRIPURARI  
PAL  
v.  
JAGAT  
TARINI DAS.

The judgment of their Lordships was delivered by LORD MACNAGHTEN. Their Lordships are of opinion that in this case the decision of the High Court cannot be supported. There is, in their Lordships' view, an absolute gift of the *shebaitship* to the son Mukunda Murari on his attaining majority, and it is not cut down, as far as they can see, by anything that follows. There are provisions in the case of his death as a minor, but no provision cutting down the absolute gift to him. The words are: "My present begotten son Mukunda Murari will be *shebait* for the performance of those ceremonies."

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, and the judgment of the Subordinate Judge restored.

There will be no order as to the costs incurred in the High Court, except that any costs paid under the order appealed from must be returned, and there will be no costs of this appeal.

*Appeal allowed.*

Solicitors for the appellants: *W. W. Boz & Co.*

J. V. W.

## APPELLATE CRIMINAL.

*Before Mr. Justice Chitty and Mr. Justice Richardson.*

ANATH NATH DEY

*v.*

EMPEROR.\*

1912

Nov. 4.

*Trade-mark—Using a false trade-mark—Possession of instruments for counterfeiting a trade-mark—Selling umbrellas with counterfeit trade-mark—Trade-name, use of, by rival manufacturer—Using a false trade description—Penal Code (Act XLV of 1860), ss. 482, 485 and 486—Merchandise Marks Act (IV of 1889), ss. 6 and 7.*

A trade-mark must be some visible and concrete device or design affixed to goods to indicate that they are the manufacture of the person whose property the trade-mark is. It might consist of a name impressed in some distinctive way. There is a distinction between a trade-mark and a trade-name.

*Singer Manufacturing Co. v. Loog* (1) referred to.

Where a tradesman alleged in his complaint to the Magistrate that his trade-mark consisted of a particular device, with the name "*Butto Kristo Pal*" or "*Sri Butto Kristo Pal*," said to be that of his son, but at the trial claimed only the name as the trade-mark, while one of the partners disclaimed the device except the name, and the former's son claimed the name as representing his own trade-mark in a separate business, and the rest of the prosecution evidence did not establish the possession or use of any specific trade-mark :—

*Held*, that the complainant had not proved that he had a trade-mark for the infringement of which a rival trader, using a similar device with the same name, could be convicted under ss. 482, 485 or 486 of the Penal Code, and that the case was of a civil nature.

When a manufacturer has no exclusive right to manufacture a certain article or even articles of a particular brand, all that he can claim is that no other manufacturer should so mark such articles as to pass them off as the former's when they are not.

\*Criminal Appeal, No. 701 of 1912, against the order of N. Bagchi, Fourth Presidency Magistrate of Calcutta, dated Aug. 22, 1912.

1912  
 ANATH NATH  
 DEY  
 v.  
 EMPEROR.

*Semble*: The improper use of a trade-name may fall under s. 5 of the Merchandise Marks Act (IV of 1889), and be punishable under s. 6 or s. 7 as a false trade description.

THE appellant was tried by the Fourth Presidency Magistrate, on charges under sections 482, 485 and 486 of the Penal Code and sections 6 and 7 of the Merchandise Marks Act (IV of 1889), and convicted and sentenced under the former sections, on the 22nd August 1912, to a fine of Rs. 210, and in default to simple imprisonment for three months. The instruments for counterfeiting a trade-mark found in his possession were ordered to be confiscated.

The complainant, Ashutosh Pal, had carried on a business in the manufacture and sale of umbrellas, at No. 121, Old China Bazar, for the last 10 or 12 years, in partnership with Nogensdra Nath Dey and Lal Behary Ghose. His son, Butto Kristo Pal, had a similar but independent business at 120, Old China Bazar. Ashutosh Pal, in his complaint to the Chief Presidency Magistrate, alleged that his business was of long standing, that one brand of his umbrellas was known in the market as "*Butto Kristo Pal*" umbrellas, being so named after his son, that he had a trade-mark with a specific device (which he exhibited) bearing the words "*Butto Kristo Pal*" or "*Sri Butto Kristo Pal*," and that the appellant had counterfeited his trade-mark by using a similar design containing the same name, and had sold "*Butto Kristo Pal*" umbrellas as his own manufacture. At the trial, however, he stated, in cross-examination, that his trade-mark consisted only of the name. One of the partners deposed to the same effect, while the other positively repudiated the exhibited mark as a whole except the name. The complainant's son, who was also examined for the prosecution, claimed the name as being *his* own trade-mark in the separate business. A number

of other witnesses was examined, but none of them proved that the complainant had any particular device as a trade-mark, though they stated that there was a brand of umbrellas known as "*Butto Kristo Pal*," and that when they received orders for such articles they procured them from the complainant's firm.

The appellant was carrying on a similar business at No. 125-6, Old China Bazar Street, and sold umbrellas with a similar device, also containing the words "*Butto Kristo Pal*." His case was that one Tulsi Das Pal, who was in the trade for about 20 or 25 years previous to his insolvency in 1908, had manufactured and sold umbrellas called "*Butto Kristo Pal*" after his son, and that Tulsi had, shortly before becoming an insolvent, sold the business to him. It was proved that the appellant had sold such umbrellas since 1908, and the dies and plates used in imprinting his trade-mark were found on his premises and seized.

The Magistrate convicted him as stated above, whereupon he appealed to the High Court against that order and sentence.

*Mr. Eardley Norton, Babu Atulya Charan Bose and Babu Ramani Mohan Chatterji*, for the appellant.

*The Advocate-General (Mr. G. H. B. Kenrick, K. C.)*, for the Crown.

*Cur. adv. vult.*

CHITTY AND RICHARDSON JJ. The appellant, Anath Nath Dey, has been convicted by the Fourth Presidency Magistrate of offences under sections 482, 485 and 486 of the Indian Penal Code, and sentenced to pay a fine of Rs. 210, or in default to undergo 3 months' simple imprisonment, the fine if realised to be paid to the complainant as compensation. The appellant was also charged in the alternative with offences under sections 6 and 7 of the Merchandise Marks Act, 1889,

1912

ANATH NATH  
DEY  
v.  
EMPEROR.

1912.  
ANATH NATH  
DEY  
v.  
EMPEROR.

but, beyond stating the fact at the commencement of his judgment, the learned Magistrate has taken no further notice of it. He has not at all discussed those charges or come to any finding upon them. The case of the complainant Ashutosh Pal, as put forward in his petition of complaint, is that he manufactures and carries on business in umbrellas; that his business is of long standing and his umbrellas known in the markets as "*Butto Kristo Pal*" umbrellas, "*Butto Kristo Pal*" being the name of his son; that his trade-mark is the device annexed to the petition and marked A. (In Court it has been marked as Exhibit 1.) He further complained that the appellant who had recently started business in umbrellas had counterfeited the said trade-mark, using one very similar to it, (Exhibit B). (In Court that has been marked as Exhibit 2.) He accordingly charged the appellant under sections 482, 485 and 486 of the Indian Penal Code, and sections 6 and 7 of the Merchandise Marks Act, 1889. The appellant filed a written statement denying the complainant's trade-mark. He alleged that Butto Kristo Pal was the son of Tulsi Das Pal, whose umbrella business he (the appellant) had purchased. He further complained that, the parties being rival traders, this case had been brought against him falsely and maliciously in order to ruin his business.

When the case came on for hearing the complainant gave evidence. He swore that the umbrellas manufactured by him in the name of his son were known as "*Butto Kristo Pal*" umbrellas. He further swore to the design (Exhibit 1), and to the appellants alleged counterfeit of it (Exhibit 2). In cross-examination he alleged his trade-mark in umbrellas to be "*Butto Kristo Pal*" or "*Sri Butto Kristo Pal*." One of the complainant's partners, Nagendra Nath Dey, stated: "The trade-mark of the umbrellas is '*Butto Kristo*"

*Pal.*” The other partner, Lal Behari Ghose, in cross-examination went further. He said : “ Our trade-mark is ‘ *Butto Kristo Pal*.’ This configuration (meaning Exhibit 1) is not our trade-mark. ‘ *Butto Kristo Pal* ’ only is our trade-mark.” He admitted that it had not been advertised, still less registered. Butto Kristo Pal, the son of complainant, has no business connection with his father, except that Nagendra Nath Dey, one of complainant’s partners, is also his partner. They carry on a separate business at 120, Old China Bazar, the complainant’s shop being at 121. Butto Kristo Pal, in cross-examination, said : “ ‘ *Butto Kristo Pal* ’ is my trade-mark at No. 120. The shop at No. 120 was opened 3 or 4 years ago.” The complainant called a number of other witnesses, merchants, who had bought umbrellas of his firm, and others. Not one of them speaks to any device or trade-mark of the complainant, but their evidence goes to show that there is a brand of umbrellas in the market known as “ *Butto Kristo Pal* ” umbrellas, and when they are asked for such umbrellas they write to the complainant’s firm for them. It is said that the complainant has been doing this business for 10 or 12 years.

The charge against the appellant is, that he has also been selling umbrellas as “ *Butto Kristo Pal* ” umbrellas, a number of which were found at his place of business, No. 125-6, Old China Bazar. A wooden block, the die of Exhibit 2, was also found and has been put in to support the charge under section 485.

The appellant called evidence to show that Tulsi Das Pal, who admittedly had dealt in umbrellas for 20 or 25 years previous to his insolvency in 1908, had used the name of “ *Butto Kristo Pal* ” to denote one class of his umbrellas for 3 or 4 years prior to 1908, he also having a son Butto Kristo Pal. Tulsi Das Pal is a cousin of the complainant who learnt his business in

1912.

ANATH NATH  
DEY  
v.  
EMPEROR.

1912  
ANATH NATH  
DEY  
v.  
EMPEROR.

Tulsi Das' shop. It was further alleged that Tulsi Das Pal, on the eve of his insolvency, sold his business to the appellant, who has since carried it on. There can be no doubt that Tulsi Das Pal before 1908, and the appellant since that date, have received orders from the mufassil for "*Butto Kristo Pal*" umbrellas.

On this evidence the learned Magistrate has convicted the appellant under sections 482, 485 and 486 of the Indian Penal Code. In our opinion that conviction cannot possibly stand.

A trade-mark must be some visible concrete device or design affixed to goods to indicate that they are the manufacture of the person whose property the trade-mark is. It might, no doubt, consist of a name impressed in some distinctive way. In this case the complainant has no exclusive right to manufacture umbrellas or even umbrellas of a particular kind. All that he could claim would be that no other manufacturer should so mark umbrellas as to pass them off as the complainant's manufacture when they were not. This the complainant alleged that the appellant had done by affixing a mark or design closely resembling his own and containing the name "*Butto Kristo Pal*." The complainant, however, has completely failed to show that he has any such trade-mark. In his complaint he put forward Exhibit 1 as his trade-mark, but in his examination he went back on this, and claimed simply the use of the name "*Butto Kristo Pal*." His partner, Lal Behari Ghose, went further and denied that Exhibit 1 was their trade-mark, while the son, Butto Kristo Pal, claimed the name as his trade-mark in a business independent of his father's. Not one of the complainant's witnesses speak to the complainant having any trade-mark, meaning any design or device, nor do they suggest that his umbrellas are known by any such trade-mark. It appears that



the case was allowed to change its character as it went on. From a case relating to the making and use of a false trade-mark, it drifted into a case of using a false trade-name. The distinction between a trade-mark and a trade-name is clear: see the remarks of Lord Blackburn in *Singer Manufacturing Co. v. Loog* (1). The improper use of a trade-name might fall within the purview of section 5 of the Merchandise Marks Act, and be punishable under section 6 or 7 as a false trade description. That, however, is not the case here. There is no proved trade-mark of the complainant for infringing which the appellant can be convicted under sections 482, 485 or 486 of the Indian Penal Code. We are not prepared to say what might have been the result had the case been confined to the charges under sections 6 and 7 of the Merchandise Marks Act. It has not been dealt with on that footing, and the appellant could not, as the evidence at present stands, be convicted under either of those sections.

We allow the appeal, set aside the conviction under sections 482, 485 and 486 of the Indian Penal Code, and direct that the fine, if paid, be refunded. The property confiscated must be returned to the appellant. We may add that we agree with the contention of the appellant that this case ought never to have been brought in the Criminal Court. The dispute between the parties is one of a civil nature, and could have been much more satisfactorily dealt with by a Civil Court.

E. H. M.

*Appeal allowed.*

(1) (1882) L. R. 8 A. C. 15, 32.

1912.  
ANATH NATH  
DEY  
v.  
EMPEROR.

## PRIVY COUNCIL.

P.C.<sup>s</sup>  
1912

Oct. 30 ;  
Nov. 13.

KIRPAL SINGH

v.

BALWANT SINGH.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB, AT LAHORE.]

*Hindu Law—Alienation—Custom of agriculturists in the Panjab—Ancestral land—Power of father to alienate—Necessity—"Just debts"—Burden of proof—Debts of proprietor incurred by reckless extravagance and for illegal or immoral purposes.*

In a suit by the respondents to have set aside an alienation of part of the family property made by their father in favour of the appellant, alleging that by the custom of agriculturists in the Punjab he was not competent to sell ancestral land without necessity, that there had been no necessity for the sale, that their father was a debauchee and an extravagant person, and that the debts for which the sale was made were incurred for immoral and illegal purposes, the appellant did not deny the custom though he traversed all the other allegations in the plaint, and contended that, the alienation having been made for their father's antecedent debts, it was for the respondents to show that the debts were contracted for illegal or immoral purposes. There were concurrent findings by the Courts below that the respondents' father was recklessly extravagant and did not know how to manage his affairs properly, and that certain specific debts were "just debts," and others were not :—

*Held* (affirming the decision of the Chief Court of the Punjab), that the custom set up, not being disputed, was applicable to the case ; that the payment of a "just debt" by the male proprietor of lands to which the custom applied was a necessity for which he could validly alienate ancestral property ; and that the respondents were entitled to possession of the property sued for on re-payment to the appellant of such part of the purchase money as both Courts concurrently found to be just debts, the payment of which was a necessity.

\* *Present* : LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

The ruling in *Deri Ditta v. Surlagar Singh* (1) that a "just debt" means "a debt which is actually due, and is not immoral, illegal or opposed to public policy, and has not been contracted as an act of reckless extravagance or of wanton waste, or with the intention of destroying the interests of the reversioners," was approved of by their Lordships of the Judicial Committee.

1912  
KIRPAL  
SINGH  
v.  
BALWANT  
SINGH.

APPEAL from a judgment and decree (16th January 1909) of the Chief Court of the Punjab, which varied a judgment and decree (31st July 1907) of the District Judge of Gujranwala.

The defendant was appellant to His Majesty in Council.

The facts shortly stated were, that Gurbakhsh Singh, the father of the plaintiffs (respondents) Balwant Singh and Jaswant Singh, sold to the defendant Kirpal Singh by a registered deed, dated 26th August 1892, 5,374 kanals of land being a moiety of a joint-holding owned by himself and his younger brother Bhagawan Singh, situate in Mananwala Bar, Tahsil Khangah Dogran, in the Gujranwala district of the Punjab, for the sum of Rs. 18,000; that on a subsequent partition of the joint-holding the vendee Kirpal Singh took possession of 2,848 kanals under the said sale; that Gurbakhsh Singh died in 1894, leaving his two sons, the plaintiffs, who in June 1894 brought the suit, out of which the present appeal arose, for possession of the 2,848 kanals of land against Kirpal Singh, alleging in their plaint that the land sold by their father Gurbakhsh Singh under the deed of 26th August 1892 was his ancestral property, which he had been induced to sell by the exercise of undue influence; that their father was a man of dissolute and extravagant habits; that by the custom of the agriculturists of the Punjab he was not competent to alienate the said lands, except

1912  
KIRPAL  
SINGH  
v.  
BALWANT  
SINGH.

for legal necessity; and that the sale had been made without valid consideration and necessity, and did not therefore affect their rights of inheritance. They prayed that the sale might be declared null and void, and for a decree for possession of the lands; and that if any portion of the purchase money was found to have been raised for a necessary purpose, the decree for possession might be granted subject to payment of such amount.

The defendant traversed all the principal allegations in the plaint; and on the three main issues raised in the pleadings the District Judge held (i) that the land in suit was the ancestral property of Gurbaksh Singh; (ii) that the sale in question was not induced by the exercise of undue influence; and (iii) that the sale was effected for consideration and necessity, except to the amount of Rs. 4,900 out of the total price of Rs. 18,000.

The District Judge therefore granted the plaintiffs a decree for possession of the land sued for, conditional on payment to the defendant of Rs. 13,100.

From that decision two appeals were preferred to the Chief Court, the plaintiffs urging that the sale was wholly void, and the defendant asking that it should be held to be valid as against the plaintiff.

The Chief Court (RATTIGAN and SHAH DIN JJ.) affirmed the findings of the District Judge on the three issues as above stated, except that they were of opinion that a sum of Rs. 6,100 was the only amount borrowed for necessity, and that in payment of that sum the plaintiffs were entitled to a decree for possession. The Chief Court therefore varied the decree of the District Judge in favour of the plaintiffs, and dismissed the defendant's appeal. The details of the decisions appear in the judgment of their Lordships of the Judicial Committee.

On this appeal,

*De Gruyther, K. C.*, and *B. Dube*, for the appellant, contended that the onus was on the respondents to show the existence of circumstances under which they were entitled to question the validity of the sale by their father to the appellant. There was no sufficient evidence on the record to show that Gurbakhsh Singh was a person of immoral habits and lived in a dissolute and extravagant manner; and it was submitted that the debts in dispute were properly incurred for lawful purposes, and were binding upon the respondents. The ordinary Hindu law was that by which the parties were governed, and not the customary law of the Punjab. The principle governing such a case as this was laid down in *Bhagbut Pershad Singh v. Girja Koer* (1) to the effect that (except for debts contracted for immoral or illegal purposes) the whole of the undivided family estate would be, in the hands of the sons, liable to the debts of the father, and that it was for the sons to show affirmatively that the debts were contracted for an illegal or immoral purpose, and evidence of general extravagance of the father was insufficient to establish that.

As to similar cases decided in the Punjab Courts, reference was made to Sir W. Rattigan's Customary Law of the Punjab (7th ed.), page 97; *Jagannath v. Tulsi Das* (2); *Bahadur Singh v. Desraj* (3); *Devi Ditta v. Saudagar Singh* (4); and *Sardari Mal v. Khan Bahadur Khan* (5). There was no obligation on the appellant to show that the loan was borrowed for necessity.

(1) (1888) I. L. R. 15 Calc. 717, (2) (1898) Punjab Rec. No. 72.  
719, 724; L. R. 15 I. A. 99, (3) (1901) Punjab Rec. No. 53.  
100, 103. (4) (1900) Punjab Rec. No. 65.

(5) (1899) Punjab Rec. No. 11.

1912  
 KIRPAL  
 SINGH  
 v.  
 BALWANT  
 SINGH.

*Sir H. Erle Richards, K.C.*, and *Abdul Majid*, for the respondents, contended that they being Sikh Jats and agriculturists were governed not by the ordinary Hindu law, but by the customary law of the Punjab. Just as there was the Common Law in England, so in the Punjab there was a customary law for all, and all were bound by it. Reference was made to *Sir W. Rattigan's Customary Law of the Punjab*, pages 1 and 93, and the authorities there cited. The custom pleaded in this case was that agricultural land was inalienable, except for necessity. The custom set up in the plaint was not denied, and the case was not treated in the Courts below, as it is now suggested it should be treated here. The land being ancestral, it was necessary to show that the sale was made for legal necessity, and the burden of proving that was on the appellant, the alienee: see *Sir W. Rattigan's Customary Law of the Punjab*, page 110, article 61(b) [*SIR JOHN EDGE* referred to a passage at page 111 which, he remarked, seemed to suggest that the onus was on the party who wished to prove the existence of the custom: and *LORD MOULTON* referred to page 113]. The appellant had not discharged the onus, and there was nothing to show that the sale took place for any necessity. The authorities cited from the Punjab Record were not applicable. *Jagannath v. Tulsī Das*(1) was not a case of agricultural land, and therefore no authority for saying that the ordinary Hindu law applied to agriculturists. In *Lachman Das v. Pahla Mal*(2) the parties were not agriculturists. In the present case the alienee (the appellant) knew all the circumstances of the loans, as in the case of *Deri Ditta v. Saudagar Singh*(3) which made the case stronger against him. In that case at page

(1) (1898) Punjab Rec. No. 72.

(2) (1908) Punjab Rec. No. 59.

(3) (1900) Punjab Rec. No. 65.

296 of the report, where the Judges sum up the law, they say "a number of small debts incurred within a short space of time amounts to extravagance," and that applied to the present case: see *Sobha Singh v. Kishore Chand*(1). There are concurrent rulings in the present case as to the reckless extravagance and ignorance of management of his affairs by Gurbakhsh Singh; and as to which were or were not just debts incurred for necessity, and on these concurrent findings of fact by the Courts below the respondents were entitled to rely. The whole circumstances of any case must be considered in coming to a decision as to whether the land has been alienated for necessity.

*De Gruyther, K. C.*, replied.

The judgment of their Lordships was delivered by SIR JOHN EDGE. This is an appeal by the defendant in the suit from a decree, dated the 16th January 1909, of the Chief Court of the Punjab, which varied a decree, dated the 31st July 1907, of the District Judge of Gujranwala.

The plaintiffs, who are Sikh Jats, and the sons of Sardar Gurbakhsh Singh, deceased, brought their suit in the Court of the District Judge of Gujranwala to obtain possession of ancestral lands which had been conveyed in their lifetime by their father to the defendant by a deed, dated the 26th August 1892. They alleged in their plaint that, according to the custom of the agriculturists of the Punjab, their father was not competent to sell the ancestral lands without necessity, and that their father was a debauchee and an extravagant person, and there was no necessity for the sale, and they prayed for a decree cancelling the sale deed and for possession on condition that they should pay to the defendant the money, if any,

1912  
KIRPAL  
SINGH  
v.  
BALWANT  
SINGH.

Nov. 13.

1912  
 KIRPAL  
 SINGH  
 v.  
 BALWANT  
 SINGH.

which might be proved to have been paid by the defendant to their father for valid necessity. The defendant, so far as is now material, alleged in his written statement that he purchased the land in good faith on payment of lawful consideration without knowledge that the plaintiffs' father was a debauchee and an extravagant person, that no debt was contracted by their father without necessity, and that the debt which their father contracted with him was spent for valid necessities. The defendant did not in his written statement deny that the plaintiffs and their father were agriculturists to whom the custom alleged by the plaintiffs would apply.

According to the sale deed of the 26th August 1892 the consideration was Rs. 18,000, the details of which stated in that deed were—

	Rs.
Left with the vendee for payment to Din Muhammad Beg, Muhammad Amin Beg, Bodh Raj and Jagan Nath, the previous mortgagees ... ..	9,500
Credited to the vendee, on account of previous debt, principal and interest due to him under a bond, dated the 13th February 1891 ... ..	4,650
Credited to the vendee, on account of the previous debt, principal and interest due to him under <i>bahi</i> account entered on leaf No. 115 ... ..	3,350
Now received in cash before the Sub-Registrar ... ..	500

As it must be taken as admitted on the pleadings that the custom alleged by the plaintiffs applied, the onus of proving the validity as against the plaintiffs of the consideration was upon the defendant, the vendee. On that basis the case was fought in the Courts below.

It was found as a fact by the District Judge, and on appeal by the Chief Court, that the plaintiff's father, the late Sardar Gurbakhsh Singh, was recklessly extravagant, and that he did not know how



to manage his affairs properly. That concurrent finding has an important bearing on the question of necessity, as the payment of a just debt by the male proprietor of lands to which the custom applies is a necessity for which he can validly as against the reversioners alienate ancestral lands. It was held in this connection by a Full Bench of the Chief Court of the Punjab, and as their Lordships consider correctly, in *Devi Ditta v. Saudagar Singh* (1) No. 65, Punjab Record, Civil Judgments, that a "just debt" means a debt which is actually due and is not immoral, illegal or opposed to public policy, and has not been contracted as an act of reckless extravagance or of wanton waste, or with the intention of destroying the interests of the reversioners.

The District Judge, and on appeal the Chief Court, dealt with the items composing the Rs. 18,000 as set out in detail in the sale deed of the 26th August 1892. It appears that the lands or some of them which were included in the sale deed of the 26th August 1892 had been previously mortgaged to Din Muhammad Beg and others by the plaintiff's father on the 10th October 1891 for Rs. 6,100 for a period of 20 years with liberty to those mortgagees to make improvements, the cost of which, with interest thereon, the mortgagor undertook to pay at the time of redemption. The District Judge found that the Rs. 6,100, part of the item of Rs. 9,500, was a just antecedent debt, the payment of which was a necessity, and that it was not proved to his satisfaction that the balance of the first item, namely, Rs. 3,400, was due from Gurbakhsh Singh to Din Muhammad and the other mortgagees, or constituted a just debt for the payment of which to Din Muhammad Beg and those other mortgagees of 1891 there was a necessity within the meaning

1912  
KIRPAL  
SINGH  
v.  
BALWANT  
SINGH.

(1) (1900) Punjab Rec. No. 65.

1912  
KIRPAL  
SINGH  
v.  
BALWANT  
SINGH.

of the custom. With those findings of the District Judge the Chief Court on appeal concurred. Their Lordships consider that these concurrent findings should be accepted as conclusive so far as the sums of Rs. 6,100 and Rs. 3,400 are concerned.

As to the second item Rs. 4,650 of the detail of the consideration, the District Judge, although he was not satisfied that there had been any necessity for the borrowing by Gurbakhsh Singh of some of the amounts which are included in that item and as to others assumed from the recitals in some of the bonds which were produced by the defendant and without further proof that there had been necessity, allowed the whole item of Rs. 4,650 as a charge which the plaintiff should pay to the defendant. The Chief Court on a careful consideration of the evidence disallowed the whole of the item Rs. 4,650.

The Judges of the Chief Court considered that the District Judge had not rightly appreciated the rule as to the onus of proof, and they were unable to find that any necessity had been established for the incurring by Gurbakhsh Singh of any of the debts which composed the item of Rs. 4,650. From that conclusion of the Chief Court their Lordships see no reason to dissent.

The District Judge disallowed Rs. 1,000 of the item of Rs. 3,350 of the detailed consideration, and the whole of the item of Rs. 500, finding that the Rs. 1,000 and the Rs. 500 were debts which Gurbakhsh Singh had incurred as acts of reckless extravagance. The Chief Court found that the District Judge had rightly disallowed the Rs. 1,000 and the Rs. 500, and pointing out that no mention of the Rs. 3,350 account was made in a consolidating bond which Gurbakhsh Singh executed on 13th February 1891, found that no necessity had been proved for any portion of the item

Rs. 3,350. With that conclusion of the Chief Court their Lordships agree.

The result that their Lordships will humbly advise His Majesty that the appeal should be dismissed and the decree of the Chief Court be affirmed. The appellant must pay the costs of this appeal.

J. V. W.

*Appeal dismissed.*

Solicitors for the appellant : *Barrow, Rogers & Nevill.*

Solicitor for the respondents : *Edward Dalyado.*

1912

KIRPAL  
SINGH

v.  
BALWANT  
SINGH.

## PRIVY COUNCIL.

### COURT OF WARDS

v.

### ILAHİ BAKHSH.

P.C.\*

1912  
Oct. 31 ;  
Nov. 26.

#### [ON APPEAL FROM THE CHIEF COURT OF THE PANJAB, AT LAHORE.]

*Mahomedan law—Endowment—Creation of endowment—Wakf by dedication or user—Graveyard, land used as—Presumption of ancient origin of shrine and burial place—Panjab Land Revenue Act (XVII of 1887), s. 44—Entry of ownership in record-of-rights at settlement.*

In this case the Judicial Committee (affirming the decision of the Chief Court of the Panjab) held, on the evidence, that the land in suit (known as the Mai Pak Damian graveyard) which had been used from time immemorial by the Mahomedan community of Multan for the purpose of burying their dead, formed part of a graveyard set apart for the Mahomedan community, and that by user, if not by dedication, the land was *wakf*.

In the record-of-rights of the last settlement an area of land, which comprised the land in suit, was entered as "in the possession of Mahomedans," and was described as *kabristan* or *ghair-mumkin kabristan* (graveyard or unculturable land forming portion of a graveyard); and in the ownership column the name of the defendant (now represented by the Court of Wards) was entered as owner. Their Lordships said: "It

\* Present : LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

1912  
COURT OF  
WARDS  
v.  
ILAH  
BAKSH.

would seem that he was properly entered as owner, being trustee and custodian of the shrine of the saint Mai Pak Daman, and being or claiming to be the recognised head of the Mahomedan community in Multan ;” and *held*, that, under section 44 of the Panjab Land Revenue Act (XVII of 1887), the entry not having been disproved must be presumed to be correct.

APPEAL from a judgment and decree (16th December 1907) of the Chief Court of the Panjab, which reversed a judgment and decree (15th April 1907) of the District Judge of Multan.

The defendant (the Court of Wards representing the estate of Makdum Hassan Bakhsh) was the appellant to His Majesty in Council.

The suit giving rise to this appeal was brought by the respondents, as representing the Mahomedan community of the city of Multan, for a declaration that certain land was in possession of the Mahomedan community as *wakf*, and was in fact a graveyard which had been used from time immemorial by them for the burial of their dead, and for an injunction restraining the appellant (the Court of Wards) from transferring any part of the said land.

The occasion for the suit being instituted was that in August 1905 the defendant, who claimed to be the owner of the land, gave notice by beat of drum of his intention to sell by auction portions of the area of land in dispute which were free from graves. The main contention of the plaintiffs was that the whole of the land in suit was the graveyard known as Mai Pak Daman, the origin of which was very ancient ; and that it was *wakf* and therefore inalienable. The suggested origin of it is given in a passage cited by their Lordships of the Judicial Committee in their judgment from the judgment of the Chief Court.

The main defence, so far as material to the present appeal, was that whilst the land actually covered with

graves may be inalienable, the portion of the land to be sold was not shown to belong to Mai Pak Daman, and that the defendant had a right to alienate it.

1912  
COURT OF  
WARDS  
v.  
ILAH  
BAKHSH.

It appeared that in 1858, up to which time there was practically no restriction on burials, the Mahomedans of Multan and the neighbourhood held a public meeting to consider the question of suitable sites for burial grounds; and a resolution having been arrived at, an application to the Commissioner of the Division was drawn up and presented by the father of Makdum Hassan Bakhsh and one Haji Ghulam Mustafa Khakwani that the owners of *khan-kahs* should keep open graveyards in their own *khan-kahs*; that four old graveyards (of which Mai Pak Daman's was one) should be kept open for the whole Mahomedan community; that three new graveyards should be started; and that all other graveyards should be closed. This proposal was sanctioned. In 1867 a somewhat similar application was made to the Deputy Commissioner by the Mahomedans of Multan City that the graveyard of Pir Umar (one of the four old graveyards above mentioned) should be demarcated and protected from encroachment, and that certain other graveyards, among which was Mai Pak Daman's, should be kept open. On 22nd August 1867 there was a *robkar* of the Deputy Commissioner which recited the order of the Commissioner in 1858 sanctioning the proposals then made, and showed that all graveyards, except the seven mentioned and the *khan-kah* graveyards should be kept closed. And on 22nd September 1867, a *robkar* sent by a Revenue Officer to the Deputy Commissioner, intimated that a parwana on the subject had been issued to the Tahsildar (a copy of which was sent to the District Superintendent of Police) that if any Mahomedan buried a

1912  
 COURT OF  
 WARDS  
 v.  
 ILAHI  
 BAKHSI.

corpse outside the authorised places, it should be exhumed and re-buried in one of those places.

The District Judge found that the defendant had never treated the land in dispute as *wakf*; that within the land in suit were scattered graveyards with clear spaces between; that the defendant had sold from time to time any clear spaces for building, though the numbers they bore were in the settlement of 1880 shown as *ghair-mumkin kabristan* (unculturable land occupied by a graveyard) notably the land sold to Government for a railway station; that he had leased others "and had realised a miscellaneous income from the whole, and had asserted his rights as landlord by exacting a due of 3 pies per grave from those burying their dead with his permission"; that these transactions had not in the past been objected to by the Mahomedan community or the general public; that there had been no dedication of the whole land as *wakf*, nor any declaration that the whole was *wakf*; that so far from its being shown that the Mahomedan community was in possession, the evidence proved that the defendant was in possession, though he did not wish to interfere with actual graves; that the defendant had a right to alienate at will the clear spaces; that the plaintiffs had not shown that they were individually affected, nor that their families were affected by the proposed sale, nor that they have the right to bury their dead in the lands to be sold.

The District Judge therefore dismissed the suit. On appeal, the Chief Court (CHATTERJI AND JOHNSTONE JJ.), after stating the facts and giving the origin of the Mai Pak Daman graveyard as quoted in the judgment of their Lordships of the Judicial Committee, continued :—

"Then in 1858 this status of *wakf* was fully recognised as we have seen. No doubt user, as such, does not deprive the owner of his title, but the title remains subject to the user of the land as *wakf*.

"This disposes of the more general question; and the next point is, what area was *wakf*? Our view is that at least all the area in suit was. The area in suit is between 50 and 60 acres in extent. At no time has the whole of it been at once covered with palpable graves; but this does not any the less make the whole a graveyard. One clan or family would bury their dead one by one in one spot, and another in another. The graves in these clusters of graves would grow in numbers as the clan increased, but continually old graves would be forgotten and would be levelled with the ground by the weather; and if a family died out, its cluster of graves would in a few years become effaced. There would naturally be spaces clear of graves (or of known graves) between the clusters of graves of this clan and of that clan, providing room for new burials; and hence we find the state of affairs, which is used by the defendant's counsel as an argument in favour of his client, *viz.*, that in the area in suit are very many separate graveyards, one occupied by butchers, one by zamindars, and so forth. In reality these are not separate graveyards, but only separate clusters of graves in one big area forming a single graveyard. These clusters are not known to the Revenue authorities or to the people by distinctive names. Further, it is peculiarly necessary that the clear spaces should not be appropriated for other purposes, inasmuch as all burying of bodies outside of the seven authorised areas aforesaid has been prohibited. This was fully recognized in 1867 (*vide* the application of that year by the *raises* of Multan, mentioned above). To hold that the clear spaces are at the disposal of the defendant would amount to a closure of the graveyard as a whole, for such spaces are necessary if any more burials are to be made. Again, there is evidence that in more than one clear space on digging up the soil human bones have been found, showing that these spaces have in past centuries been used for burials. We would hold, then, that the whole area intended in 1858 to be reserved as a graveyard under the name of Mai Pak Daman is *wakf* by user, if not by dedication, and that even the clear spaces in that area are inalienable by defendant; but Mr. Parker goes on to argue that none of the land proposed to be sold is really within that area. In the Revenue records none of the land in suit is called after Mai Pak Daman, which name does not seem to have been used at all; but all the *khassra* numbers are described as *kabristan* or *ghair-mumkin kabristan*. In our opinion this is sufficient. In 1858 it was settled that the only *kabristans* (outside of *khankahs*) were to be the seven aforesaid. It is not pretended that the land proposed to be sold is in any *other* one of those seven, and the land in suit generally is admitted to be in the Pak Daman cemetery. The land to be sold adjoins the land admittedly in Pak Daman; and thus the conclusion is irresistible, unless the Revenue records are incorrect, that the lands to be sold also belong to the Pak Daman lands. Mr. Parker's

1912  
COURT OF  
WARDS  
v.  
ILAH  
BAKHSH.

1912  
 COURT OF  
 WARDS  
 v.  
 ILAHI  
 BAKHSI.

reference to Exhibit P-13, extract from Settlement map of 1880, is useless. It is only an extract, and the mere fact that it only shows land between the two roads and excludes some of the land in suit proves nothing ; for it is not authoritatively a map showing the exact limits of Pak Daman cemetery. Indeed no map exists, so far as we know, which does show those limits as such : all we know is that the Settlement map of 1880 clearly shows that each and every *khasra* number in suit has graves in it, though of course not all over it. It may be that Exhibit P-13 was put forward by plaintiffs as showing the Pak Daman cemetery ; but it was an incomplete extract, and plaintiffs are not bound by it.

"The onus being thus on the defendant to show that, as a matter of fact, the land to be sold is not *kabristan*, I am unable to see that he has discharged that onus.

"Only two further minor arguments used by Mr. Parker need be noticed. He contends that such land has been left for extension, and only some 11 acres are to be sold. This is immaterial in our opinion. The whole is *wakf*. Again, he argues that the Makdum and his father have in the past made repeated alienations of portions of land included within Pak Daman, and, the Mahomedan community having raised no objections, plaintiffs cannot now contest the present proposed sale. Mr. Shafi has fully satisfied us that illegal acts by defendant in the past do not deprive plaintiffs in such cases of their rights : the community may from apathy or because of some countervailing advantage have acquiesced in alienations being made in and in buildings being erected upon the land of the cemetery, and yet it does not lose its right to object to further alienations. In this connection we need only refer to Ameer Ali's Mahomedan Law, 3rd edition, p. 375 last para., and p. 381. As regards another part of this argument, *viz.*, that the alleged levy by the Makdum of 1 pice per burial as a fee shows exercise of dominion over the land, we need only remark that the evidence seems to show that *fukirs* take these fees and not the Makdum ; and if these men take the fees as *mujawars*, as Mr. Parker suggests, then the income goes to the shrine and not to the Makdum in person and therefore no inference in defendant's favour can be drawn from the circumstance."

In the result the decision of the District Judge was reversed, and the plaintiffs' claims decreed in full.

On this appeal,

*De Gruyther K.C.* and *G. Considine O'Gorman*, for the appellant, contended that the land had never been treated as *wakf*. On the finding of the District Judge it appeared that the person whose estate was



represented by the Court of Wards was the owner of the land, and that was not denied ; that he had treated it without any objection as his private property, and had charged a fee for burials there. The vacant spaces where there were no graves would remain the private property of the appellant and be part of his estate. The Chief Court had wrongly placed the onus on the appellant ; but it being conceded that he was the owner of the land, the burden of proving a dedication of the whole of the land as *wakf* lay, it was submitted, upon the respondents, and they had failed to prove it. The appellant being in possession, the respondents were not, under section 42 of the Specific Relief Act (I of 1877), entitled to the declaration they sought, and their suit should have been dismissed.

*Arthur Grey*, for the respondents, contended that the whole of the land in suit was shown in the Revenue records as in the possession of the Mahomedan community for use as a graveyard ; and those entries raised a presumption in favour of the respondents which the appellant had not rebutted. Reference was made to the Panjab Land Revenue Act (XVII of 1887), section 44 ; and it was suggested that, judging from the entries in the record-of-rights, Makdum Hassan Bakhsh was the trustee and custodian of the shrine of Mai Pak Daman to which the respondents alleged the land in dispute appertained as a graveyard. There was also a presumption that land in such possession, as this was shown to be, for the specific purpose of burying the dead, had been properly dedicated as *wakf*, and was consequently inalienable. Even if no express dedication could be proved, the reservation of the ancient Mai Pak Daman in 1858, together with the entries in the Settlement record, showed that the land had become *wakf* by user. The decision of the

1912  
COURT OF  
WARDS  
v.  
ILABI  
BAKHSH.

1912  
 COURT OF  
 WARDS  
 v.  
 ILAHI  
 BAKHSH.

Chief Court was right, and the appeal should therefore be dismissed.

*De Gruyther K. C.*, in reply, said that it had never before during the case been even hinted at that Makdum Hassan Bakhsh was a trustee, or held the land in any other capacity than as owner.

Nov. 26.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In the immediate neighbourhood of the City of Multan there is a large tract of unculturable or uncultivated land generally known as the Mai Pak Daman or the Pak Daman graveyard. From time immemorial it has been used by the Mahomedan community in Multan for the purpose of burying their dead. But there is no evidence to show when or how it was originally set apart for the purpose of a burial ground.

In the judgment of the Chief Court in this case there occurs the following passage giving, as their Lordships think, a very probable account of the origin and early history of this graveyard :—

“Bahawal Hakh, the famous saint, was born in the 12th century of the Christian era. He had a son, Sadr-ul-din, whose wife was called Mai Pak Daman. She was revered as a saint, and her body was buried in a shrine within the area in suit. No one can tell when the surrounding land was definitely set aside as *wakf*; but we can safely conjecture that in the first instance Mussalmans began to bury their dead here and there in the waste land about her tomb, because of the desire to be buried near the body of a saint. There can be no doubt that for hundreds of years the land about her tomb has been used as a burial ground, and though there is no direct proof of dedication as *wakf*, we can safely conclude that long before 1858 it had become *wakf* at least by user.”

The year 1858 referred to in the above passage is the date of a representative public meeting of Mahomedans called by the authorities for the purpose of considering the question of Mahomedan graveyards for the city. At that meeting a resolution

was passed apparently in accordance with the suggestion of the Government to the effect that owners of *khankahs* or shrines should keep open graveyards in their own *khankahs*, that four old graveyards, of which Mai Pak Daman was one, should be kept open for the whole Mahomedan community, that three new graveyards should be provided, and that all other graveyards should be closed. The predecessor in title of the person, for whom the Court of Wards is now acting, took part in giving effect to this resolution.

The resolution was sanctioned by Government, and in 1867 a *robkar* was published giving notice that if any Mahomedan buried a corpse outside the authorised places, it would be taken up and buried in one of those places.

In the record-of-rights of the last settlement an area of land which comprises the land in this suit is entered as "in the possession of the Mahomedans," and is described as *kabristan* or *ghair-mumkin kabristan*, that is "graveyard or unculturable land forming portion of a graveyard." In the ownership column Makdum Hassan Bakhsh, now represented by the Court of Wards, is entered as "owner." It would seem that he was properly entered as owner, being trustee and custodian of the shrine of the saint Mai Pak Daman, and being or claiming to be the recognised head of the Mahomedan community in Multan.

In this state of things the appellant, the Court of Wards for the property of Makdum Hassan Bakhsh, advertised for public sale a piece of ground lying within the area of the graveyard as described in the settlement papers.

Thereupon certain Mahomedan residents in Multan of different classes and various occupations combined together and brought this suit as co-plaintiffs, claiming an injunction to restrain the proposed

1912  
COURT OF  
WARDS  
P.  
ILAH  
BAKHSH.

1912  
 COURT OF  
 WARDS  
 v.  
 ILAHI  
 BAKHSH.

sale, and also asking for a declaration that certain lands described in the settlement records as graveyard, and comprising an area considerably larger than that now in suit, was inalienable as *wakf*. It appeared in the course of the suit that on part of the land described as "graveyard" in the settlement papers there had been encroachments, that part had been acquired for public purposes, and that some lots had been, as it was alleged, sold by the Makdum for his private purposes. So, in order to avoid all questions which might be raised with regard to land which had been so dealt with, the plaint was amended, and the area for which protection was claimed was limited to a piece of ground measuring 437 kanals and 4 marlas, or something between 40 and 50 bighas.

The District Judge dismissed the suit with costs. On appeal, the Chief Court granted the relief asked for by the plaintiffs, but without costs. From this order of the Chief Court the Court of Wards has appealed to His Majesty in Council.

The only substantial ground of appeal urged before the Board was that the area known as the Pak Daman graveyard was not one continuous burial ground, but merely an area of uncultivated ground in which here and there there were to be found graves or clusters of graves, and the defence set up was that vacant ground unoccupied by graves remained the private property of Makdum Hassan Bakhsh, and that the Court of Wards was bound or entitled to deal with it for the benefit of his estate without regard to the claim advanced by or on behalf of the Mahomedan community in Multan.

The Panjab Land Revenue Act, 1887 (Act XVII of 1887), section 44, enacts that "an entry made in a record-of-rights in accordance with the law for the time being in force . . . shall be presumed to be

true until the contrary is proved or a new entry is lawfully substituted therefor."

Their Lordships agree with the Chief Court in thinking that the land in suit forms part of a graveyard set apart for the Mussalman community, and that by user, if not by dedication, the land is *wakf*. The entry in the record-of-rights seems conclusive on the point. It is obvious that if it were held that within the area of the graveyard land unoccupied or apparently unoccupied by graves was private property and at the disposal of the recorded owner, it would lead to endless disputes, and the whole purpose of the Government in setting aside land as an open graveyard for the Mahomedan community in Maltan would be frustrated.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

J. V. W.

*Appeal dismissed.*

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *Ranken Ford, Ford & Chester.*

1912  
COURT OF  
WARDS  
v.  
ILAH  
BAKHSH.

**APPEAL FROM ORIGINAL CIVIL.**

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and  
Mr. Justice Harington.*

1912

Nov. 27

RODRICKS

v.

SECRETARY OF STATE FOR INDIA.\*

*Jurisdiction—Secretary of State for India in Council—"Dwell or carry on  
business or personally work for gain"—Letters Patent, 1865 s. 12.*

This Court has no jurisdiction to entertain a suit brought against the Secretary of State for India in Council, where the cause of action has arisen wholly outside the ordinary original civil jurisdiction of this Court, on the sole ground that the Secretary of State for India in Council dwelt or carried on business or personally worked for gain within the local limits of Calcutta, the capital of India at the time of the institution of this suit.

*Doya Narain Tewary v. The Secretary of State for India in Council* (1) followed.

APPEAL by the plaintiff Bertram Eustace Moseley Rodricks from the judgment of Chaudhuri J.

This appeal arose out of a suit for malicious prosecution brought by the plaintiff against the Secretary of State for India in Council. It was alleged by the plaintiff that while employed as a permanent way inspector on the Eastern Bengal State Railway, he was falsely and maliciously and without reasonable or probable cause prosecuted for criminal breach of trust by the defendant, through his servants and agents, certain railway officials, in the district of Rungpur, that the prosecution terminated in an acquittal and that the plaintiff suffered damage, which he estimated at Rs. 10,000. Paragraph 9 of the plaint was

\* Appeal from Original Civil No. 50 of 1912.

(1) (1886) I. L. R. 14 Calc. 256.

as follows:—"That inasmuch as it may be contended that part of the plaintiff's cause of action herein arose outside Calcutta, the plaintiff craves leave under clause 12 of the Charter to institute this suit." Leave was granted, but there was nothing in the plaint to justify the grant of leave: and the argument both in the Court of first instance and on appeal proceeded on the basis that the whole of the cause of action in the suit arose outside the local jurisdiction of this Court.

In his written statement, the defendant besides defending the action on its merits took the pleas, that the plaint disclosed no cause of action, and that on the face of the plaint it appeared that the alleged cause of action arose wholly outside the ordinary original civil jurisdiction of this Court, and that this Court had no jurisdiction to entertain this suit.

The suit came on for hearing before Chaudhuri J. Inasmuch as it was conceded by the plaintiff that the cause of action arose entirely outside the local jurisdiction of this Court, the only question was whether the Secretary of State for India in Council could be said to be a person who dwelt or carried on business or personally worked for gain within Calcutta, which at the time of the institution of the suit was the capital of India. There was nothing further in the plaint to indicate that this Court had jurisdiction. Chaudhuri J. considering himself bound by authority dismissed the suit, on the 2nd April 1912, on the ground that the Court had no jurisdiction to entertain it, observing:—

"The plaintiff in this suit seeks to recover the sum of Rs. 10,000 by way of damages for a false and malicious prosecution, said to have been conducted against him in the district of Rungpur in which he says he was falsely accused of criminal breach of trust in respect of certain articles belonging to the Eastern Bengal State Railway when he was employed as a servant of the Railway. He states that the criminal proceedings terminated in his acquittal, that such proceedings were taken maliciously and without reasonable or probable cause, and claims to be

1912

RODRICKS  
F.  
SECRETARY  
OF STATE  
FOR INDIA.

1912

RODRICKS  
v.  
SECRETARY  
OF STATE  
FOR INDIA.

entitled to judgment against the Secretary of State for India in Council for damages. It has not been argued before me, whether or not, such a suit is maintainable against the Secretary of State for India in Council, the only point urged being that this Court has no jurisdiction under the Charter to entertain it. The argument on both sides has also proceeded upon the basis that the whole of the cause of action in this suit arose outside the local jurisdiction of this Court. I find, however, from the 9th paragraph of the plaint that the plaintiff asked for leave under clause 12 of the Letters Patent "to safeguard himself against any contention" that part of the cause of action arose outside Calcutta. I find also from an endorsement on the plaint that such leave was granted by a learned Judge of this Court then sitting on the Original Side. I do not, however, find anything in the plaint upon which such leave could have been granted. It may be there are facts which have not been fully set out in the plaint upon which the plaintiff could have legitimately asked for such leave, but as the matter now stands, I must hold that leave under cl. 12 was not rightly granted and the Secretary of State for India in Council cannot be bound by the leave so given. The order was made in his absence, and he can, undoubtedly, question it. As I have said before, the argument has proceeded on the basis that no part of the cause of action in this suit arose within the local limits of the jurisdiction of this Court. The learned Advocate-General contends that this Court has no jurisdiction to try an action of this character against the Secretary of State for India in Council—the cause of action having arisen wholly outside the local jurisdiction of this Court. He says that unless it can be shown in cases like this that the Secretary of State for India in Council is a person who dwells or carries on business or personally works for gain within the local limits of Calcutta, this Court cannot try a suit instituted against him, and relies upon *Doya Narain Tewary v. The Secretary of State for India* (1). That case was decided by two Judges sitting on the Original Side of this Court composing a Bench constituted by the then Chief Justice on the 10th August 1886. There were three other similar cases which were referred to the same Bench for disposal, in all of which the Secretary of State for India in Council was defendant. The Bench was so constituted, I take it, upon a reference by one of the Judges who was then sitting on the Original Side of this Court under rule 54 (Original Side), although I have not been able to find the order of reference. There is no doubt that the case of *Doya Narain Tewary* (1) is direct authority for the proposition that no such suit is maintainable. The learned Judges there held that the Secretary of State for India in Council does not dwell within the local jurisdiction of this

(1) (1886) I. L. R. 14 Calc. 256.



Court, or carry on business, or personally work for gain. In so deciding the learned Judges discussed the decision of Mr. Justice Pigot in *Bipradas Dey v. Secretary of State for India* (1). Pigot J. had taken a directly opposite view. He held that such a suit was maintainable. He held further that if the Secretary of State for India in Council in this country was a legal person in any sense, he could not possibly hold that he did not carry on business in Calcutta. So far as I am concerned, I am bound by the decision of the two learned Judges Mitter and Trevelyan JJ. who constituted the Bench to whom the matter was referred, but as I am not convinced in my mind that the decision is correct, I state my reasons. However differently the word "business" may have been construed at different times, I do not think there is any question whatever that a "carrying business," is "business" within the meaning of section 12 of the Letters Patent, nor is there any doubt that a Railway Company or other corporate body, or even a body of individuals whether incorporated or not, is a "person" within the meaning of that section: see the definition of the word "person" in the General Clauses Act 1897. It cannot also be doubted that a railroad company, apart from the fact of having a registered office, "carries on business" at its principal office where the directors meet and the general business of the Company is transacted. Jessel M. R. in *Erichsen v. Last* (2), said that where the "Brain Power" is, there a trade or business is carried on. The question therefore is as to whether the Secretary of State for India in Council, is "a person" within the meaning of section 12 of the Letters Patent, and if so, does that "person" carry on business in Calcutta, which at the time of the institution of this suit was the capital of the Government of India.

I shall, therefore, first consider the position of the Secretary of State for India in Council, as a defendant in suits. In order to understand the position of the Government in this country, it is necessary to refer to certain old Acts. At the time that 21 Geo. III C. 70 and 37 Geo. III C. 142 were enacted the Governor-General, the Governors of Bombay and Madras and their councillors were servants of the East India Company, and it was necessary to protect them by special enactments from suits on account of things done by them in the exercise of their *quasi*-political functions. By Statute 3 and 4 Wm. IV C. 85 the trading capacity of the Company was abolished except as to such trade as was necessary for purposes of the State. By 21 and 22 Vic. C. 106 the Government was transferred from the East India Company to the Crown. Section 65 of that Statute provides as follows—"The Secretary of State in Council shall and may sue, and be sued as well in India, as in England by the name

1912

RODRICKS  
P.  
SECRETARY OF STATE  
FOR INDIA

(1) (1885) L. L. R. 14 Calc. 262n. (2) (1881) L. R. 8 Q. B. D. 414.

1912  
 ———  
 RODRICKS  
 v.  
 SECRETARY  
 OF STATE  
 FOR INDIA.

of the Secretary of State in Council as a Body Corporate ; and all persons and Body Politic shall and may have and take the same suits, remedies and proceedings, legal and equitable against the Secretary of State in Council of India as they could have done against the said Company ; and the Property and Effects hereby vested in Her Majesty for the Purposes of the Government of India or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company." By the words of the Statute a clear right of suit is given against the Secretary of State for India in Council as a Body Corporate. Mitter and Trevelyan JJ., however, held that this section does not constitute the Secretary of State for India a Body Corporate. Perhaps not so for all purposes, but it is quite clear that he was constituted a Body Corporate for purposes of suits, and as such represents the Government of India in such suits as may be maintained against the Government. Sir Richard Garth in *Judah v. Secretary of State for India*(1) says " It seems to me that since the Statute 21 and 22 Vict. c. 106 the Secretary of State for India in Council represents the Government here to all intents and purposes. He is the officer of the Crown authorised to sue and be sued in respect of all Crown debts and contracts." On page 452, he says " Section 1 of that Act deals only with the manner in which suits are to be brought and has nothing to do with substantive rights. The latter part of the section says nothing as to what rights may be acquired either by the Secretary of State or by the Crown through the Secretary of State, nor as to the nature or character of rights so acquired. It leaves that to be governed by the ordinary principles of law. But with regard to liabilities which may be enforced against the Secretary of State there are express words."

The East India Company was in its origin a trading company which became vested with sovereign powers. There is no question that the Company was liable to suits in respect of acts done in its trading capacity.

In *Gibson v. East India Company* (2) Chief Justice Tindal distinctly points out that the power of the East India Company was of a two-fold nature—one political and the other commercial. By 21 and 22 Vict. c. 106 such right of suits as individuals had against the East India Company were continued as against the Secretary of State. This was an exceptional enactment. Colonial Governments have been held not to be liable to such suits. They are not subject to any similar provision : see *Sloman v. Government of New Zealand* (3).

(1) (1886) L. L. R. 12 Cal. 445, 450. (2) (1839) 5 Bing. N. C. 262, 273.  
 (3) (1876) L. R. 1 C. P. D. 563.

The East India Company at the time that the Government was transferred from them had power to carry on trade for purposes of the State. After the transfer such trade has been carried on by the Government of India in this country, and as pointed out by Pigot J. in the case of *Bipradas Dey v. Secretary of State for India* (1), the Government is a frequent litigant in the Indian Courts, in respect of matters arising out of such trade.

The Secretary of State for India in Council cannot in this country claim on behalf of the Crown the prerogative of immunity from suits. As is pointed out in *The Secretary of State for India v. Hari Bhanji* (2) two principles regulate the maintenance of proceedings at law by a subject against the Sovereign—the one, having relation to the personal *status* of the defendant—the other, to the character of that in respect of which relief is sought. In England the form of procedure permitted to a subject who considers himself aggrieved by an act of the Crown, is by petition of rights. In this country the Crown has consented to submit some of its acts to the jurisdiction of the municipal Courts. It is not necessary in this case to discuss the nature of the acts for which Government can be sued in our Courts. The defendant concedes for the present, that such a suit as this is maintainable against the Government. I am therefore of opinion that for purposes of such a suit the Secretary of State for India in Council is a “body corporate” and a person within the meaning of clause 12 of the Letters Patent.

Just before the Letters Patent of 1862 the first Civil Procedure Code Act VIII of 1859 had come into operation, so far as the moffussil Courts were concerned. Section 5 of that Act dealt with the jurisdiction of these Courts. In that Act there was no provision as to how the Government might sue or be sued. The Civil Procedure Act of 1877 Chapter 27 section 416 introduced the provision which we now find in section 79 of our present Code. It laid down that suits against the Government were to be instituted in the name of the Secretary of State for India in Council. The Secretary of State for India in Council, therefore, is more than a “mere name.” He is for purposes of suits to be treated as a “person,” and represents the Government. The learned Advocate-General referred me to Ilbert’s Government of India (2nd Edition) pages 176-177, which does not help to decide the point. I notice that on page 146 the learned author says this “the office of the Secretary of State is constitutionally a unit, though there are five officers.” Reference was made by the learned Judges in *Doya Narain Tewary’s Case* (3) to *Kinlock v. Secretary of State for India in Council* (4) in which the plaintiff sued for an account and distribution of “booty of

1912

RODRICKS  
v.  
SECRETARY  
OF STATE  
FOR INDIA

(1) (1885) I. L. R. 14 Calc. 262 n. (3) (1886) I. L. R. 14 Calc. 256.

(2) (1882) I. L. R. 5 Mad. 273. (4) (1880) L. R. 15 Ch. D. 1.

1912  
 ———  
 RODRICKS  
 v.  
 SECRETARY  
 OF STATE  
 FOR INDIA.

war" come to the hands of the Secretary of State under a royal warrant. It was argued that the defendant thus became "trustee" and the "booty" was "trust fund." James L. J. held it was not a trust, and that the Secretary of State for India in Council (the name by which the Government can be sued) was not a person capable of being trustee, because according to that learned Judge the Government of India was not capable of being trustee of such fund. The property in that case had vested in the Crown, and was to be distributed by the servants of the Crown, according to the Crown's directions and that therefore no municipal Court had jurisdiction to entertain the suit. The observations made in the course of the judgment refer to the matter which was before the Court of Appeal and cannot be considered of general application. To hold that where suits are actually maintainable against the Secretary of State for India in Council that he is a "mere name," I consider erroneous. He is a "body corporate" in such a suit, according to the express words of the Statute. If, however, the Secretary of State for India in Council is a "mere name" it is quite clear that a name can never be said to "dwell" anywhere or "carry on business." It is also clear that a "mere name" can do nothing. The name cannot sue or be sued, nor can there ever be a cause of action against a "mere name," but as I hold it is not, I shall consider whether the Secretary of State for India in Council who is a "legal person" in such suits, can be said to dwell in Calcutta or carry on business there. It seems to me difficult to say that the Government does not dwell in its own capital and that a Government engaged in trades, though it may be for purposes of the State, does not "carry on business." If Sir George Jessel is right that where the "Brain Power" is, there a trade or business is carried on, the assumption that the Brain Power of the Government of India is at its seat of Government, is not an unjustifiable assumption. I would have had, therefore, no hesitation in holding that the Secretary of State for India in Council, namely the Government dwells at its capital and carries on business there, and is thus amenable to the jurisdiction of this Court, in cases where a suit can be maintained against the Government.

I have gone through the cases referred to by Mr. Justice Pigot in his judgment, and I may say I generally agree with the view expressed by him. In the case of *P. & O. S. N. Co. v. Secretary of State for India* (1), the question has been elaborately discussed. The learned Judge points out that there are several cases decided in our Courts against the Secretary of State in spite of the ruling in *Rundle v. Secretary of State in Council* (2). The observations in that case were made for the guidance of the profession and are *obiter*. About the same time the Madras Court in the case of

(1) (1861) 5 Bom. H. C. App. 1.

(2) 1 Hyde 37.

*Subbaraya Mudali v. The Government* (1), took a different view. After which came the cases of *Brito v. The Secretary of State for India in Council* (2), in which the question of jurisdiction does not appear to have been raised, and *Hari Bhamji v. The Secretary of State for India* (3). *Rundle's Case* (4) was cited during argument but was not commented upon in the judgment. It appears that in spite of the decision in *Rundle's Case* (4) the other High Courts continued to exercise jurisdiction over the Secretary of State. This Court also did the same in the case of *Ross Johnson v. Secretary of State* (5) although how it came to do so in direct conflict of the decision in *Rundle's Case* (4) is not clear. See also Hukumchand's Civil Procedure Code page 319, where the references are collected. I may also refer to *Doss v. Secretary of State for India in Council* (6), in which Sir R. Malins V. C. allowed the demurrer, one of the grounds being that the plaintiff was a resident of India and the Secretary of State "was also in India." Reference was made during argument in that case to *Re Holmes* (7) in which a demurrer was allowed on the ground that the Queen was as much "resident" in Canada as in England.

Having regard to what I have said before and with great respect to the learned Judges who decided the Case of *Doya Narain Tewary* (8), I venture to dissent from the views therein expressed, but as I hold that I am bound by the decision of a Bench so constituted, I must hold that this Court has no jurisdiction. The suit will accordingly be dismissed with costs."

From this judgment the plaintiff appealed.

*Mr. S. K. Chakravarti*, for the appellant. The learned Judge in the Court of first instance, although holding a different view, felt himself bound by the authority of *Doya Narain Tewary v. The Secretary of State for India in Council* (8), to dismiss the suit. His view, however, has the support of Pigot J. in *Bipradas Dey v. Secretary of State for India* (9). *Doya Narain Tewary v. The Secretary of State for India in Council* (8) is not binding on the Court of Appeal: the Bench which decided that case was not even an Appellate Court but a Special Bench on a reference. This Court

1912

RODRICKS  
v.  
SECRETARY  
OF STATE  
FOR INDIA.

(1) (1863) 1 Mad. H. C. 286.

(5) 2 Hyde 153.

(2) (1881) I. L. R. 6 Bom. 251.

(6) (1875) L. R. 19 Eq. 509, 535.

(3) (1879) I. L. R. 4 Mad. 344.

(7) (1861) 2 J. &amp; H. 527.

(4) 1 Hyde 37.

(8) (1886) I. L. R. 14 Calc. 256.

(9) (1885) I. L. R. 14 Calc. 262n.

1912  
 RODRICKS  
 v.  
 SECRETARY  
 OF STATE  
 FOR INDIA.

has always power to refer a matter to a Full Bench, in case it takes a different view to that of another Court of co-ordinate jurisdiction. There is a conflict of opinion in the older cases: *Rundle v. Secretary of State in Council* (1), and *Johnson v. Secretary of State* (2). The decision in *Doya Narain Tewary v. The Secretary of State for India* (3), treats the Secretary of State for India in Council as a "mere name." From the English statutes concerning the Government of India, and section 79 and Order XXVII of the Code of Civil Procedure, it is clear the Secretary of State for India in Council is a "body corporate," an entity and not a "mere name." The principal seat of the Government of India was at Calcutta, the capital. The railway was a Government enterprise.

[*Mr. Kenrick K. C.* The principal place of business of this railway was at Sealdah, which is outside the ordinary original civil jurisdiction of this Court.]

The Railway Board, governing the railway, is a department of Government and was in Calcutta.

*The Advocate-General (Mr. Kenrick K. C.)* (with him *Mr. B. C. Mitter, Standing Counsel*), for the defendant, was not called upon.

JENKINS C.J. This appeal arises out of a suit brought against the Secretary of State for India in Council, and the alleged cause of action is malicious prosecution. The suit has been dismissed by Mr. Justice Chaudhuri on the ground that the Court had no jurisdiction to entertain it. The plaintiff has appealed from this judgment maintaining that there is this jurisdiction. Under Order VII rule 1 of the Code of Civil Procedure the plaintiff is required, among other things, to show the facts constituting the cause

(1) 1 Hyde 37.

(2) 2 Hyde 153.

(3) (1886) I. L. R. 14 Calc. 256.

of action and when it arose, and also the facts showing that the Court has jurisdiction. There is no allegation in the plaint that satisfies this requirement, and the written statement takes the objection that "on the face of the plaint it appears that the alleged cause of action arose wholly out of the ordinary original civil jurisdiction of this Court, and the Court has no jurisdiction to entertain this suit." Now, it is admitted that no part of the cause of action arose within the local jurisdiction of this Court: but it is contended that the Secretary of State for India in Council is a person who dwells or carries on business or personally works for gain within the local limits of Calcutta; and it is on that ground and on that ground alone that we are asked to hold that there is jurisdiction. No doubt, this argument met with some favour in the Court of first instance, and the appellant suggests before us that he was encouraged by the view of the learned Judge to prefer this appeal. But in fact this is a point which was decided adversely to him as far back as 1886, and it has not been suggested that from that date to this, the decision to which I refer has ever been questioned or doubted: *Doya Narain Tewary v. The Secretary of State for India in Council* (1). It was the decision not of a single Judge but of a Bench of two Judges, and I think it would be wrong for us not to follow that decision. I regard it as important that matters of this kind should have all the certainty possible and that the Court should not lightly disregard a decision definitely settling a question of jurisdiction such as that which arises in this case. If the decision is wrong then it must be for a higher tribunal to correct it. For my own part, I prefer to follow it as being a decision of a Bench of two Judges which has long been accepted as a governing authority.

1912

---

 RODRICKS  
 C.  
 SECRETARY  
 OF STATE  
 FOR INDIA.

---

 JENKINS  
 C.J.

1912

RODRICKS

v.

SECRETARY  
OF STATE  
FOR INDIA.

We, therefore, hold that there is no jurisdiction and we dismiss this appeal with costs.

HARRINGTON J. I agree.

J. C.

*Appeal dismissed.*Attorneys for the appellants : *B. N. Basu & Co.*Attorney for the respondent : *Kesteven.*


---

### ORIGINAL CRIMINAL.

---

*Before Mr. Justice Carnduff.*

1912

Dec. 9.

EMPEROR

v.

JIBAN KRISTO BAGCHI.\*

*Charge—Misjoinder of charges—Joint trial on charges of criminal breach of trust and falsification of accounts committed in separate transactions—Criminal Procedure Code (Act V of 1898), ss. 233, 234 and 235—Penal Code (Act XLV of 1860), ss. 408 and 477A.*

A charge of criminal breach of trust of a sum of money can be tried under s. 235(1) of the Criminal Procedure Code, at the same time, with one of falsification of accounts made to conceal the act of misappropriation as part of the same transaction; and two unconnected charges of falsification may be tried at one trial under s. 234; but a charge of criminal breach of trust cannot be legally tried together with one of falsification relating to a distinct act of misappropriation committed in a separate transaction.

*Kasi Viswanathan v. Emperor* (1) and *Subrahmania Ayyar v. King Emperor* (2) followed.

THE prisoner was tried at the Fifth Criminal Sessions of the High Court under ss. 408 and 477A of

\* Original Criminal Case No. 8 of 1912 (5th Sessions).

(1) (1907) I. L. R. 30 Mad. 328.

(2) (1901) I. L. R. 25 Mad. 61;

L. R. 28 I. A. 257.



the Penal Code. He was a gomastha in the employ of the firm of Manik Lal Chuckerbutty and Sree Kristo Chuckerbutty carrying on a business in silk cloth at Baranasi Ghose's Street in the town of Calcutta. In August 1910 he was placed in charge of the firm and conducted its business. Later on, in October 1911, Sree Kristo, the proprietor of the firm, who usually resided in the district of Murshidabad, came down to Calcutta and called upon the prisoner for the accounts of 1317 B. S. The books were examined, and it was then discovered that the cash was short by Rs. 2,291 odd. The prisoner, on being questioned with regard to the deficiency, was alleged to have admitted the misappropriation of the amount and to have made an entry to that effect in the account-book. The charges framed against him at the trial were as follows:—

"(i) That he, on the 1st November 1910, in Calcutta, being then employed as a gomastha, ... and having been entrusted in such capacity over property to wit, Rs. 3,600 as. 3 ... committed criminal breach of trust in respect, of Rs. 500, punishable under s. 408 I. P. C.

(ii) That he, on or about the time and in the place aforesaid, ... wilfully and with intent to defraud falsified the cash-book of the firm by entering therein Rs. 3,600 as. 3, under date, 1st November 1910, as paid to Girdhari Mandal, whereas the sum paid was Rs. 3,100 as. 3, and thereby committed an offence under s. 477A I. P. C.

(iii) That he, on or about the 9th February 1911, in Calcutta, ... wilfully and with intent to defraud falsified the cash-book by showing a total therein of Rs. 1,720-9-6, whereas it should have been Rs. 2,220-9-6, and thereby committed an offence punishable under s. 477A I. P. C."

The third head of charge related to an act of misappropriation distinct from that which formed the subject of the first count.

*Mr. E. P. Ghosh*, for the prisoner, objected to the last count as bad for misjoinder with the first: *Kasi Viswanathan v. Emperor*(1).

1912  
 EMPEROR  
 v.  
 JIBAN  
 KRISHN  
 BAGCHI.

*Mr. Nisith Sen*, for the prosecution. It has been the practice of this Court to try such charges together. But I leave the matter in your Lordship's hands.

CARNDUFF J. The accused has been arraigned on three charges, and, on his behalf, *Mr. Ghose*, citing *Kasi Viswanatham v. Emperor* (1), has objected to the joinder. The objection must, I think, prevail.

The first charge is that, on the 1st November, 1910, the accused committed criminal breach of trust, punishable under section 408 of the Indian Penal Code, in respect of a sum of Rs. 500 entrusted to him by his employer.

The second is that he, on the same day, falsified his employer's cash-book by making an incorrect entry regarding the said Rs. 500, so as to cloak the breach of trust referred to in the first charge, and thus committed an offence punishable under section 477A of the Indian Penal Code as amended by section 4 of the Criminal Law Amendment Act, 1895.

The third charge is that, on the 9th February, 1911, he again falsified his employer's cash-book by showing the total on the credit side as less by Rs. 500 than he ought to have shown it, and so committed another offence punishable under section 477A of the Penal Code.

At first sight the second falsification, described above, looks as if it also had been done to conceal the earlier breach of trust charged. But it transpires, and it has been admitted by the learned counsel for the prosecution, *Mr. Sen*, that it is so, that, although there is a similarity as to the amount dealt with, the second falsification alleged had nothing whatever to do with the alleged breach of trust of the 1st November and the first falsification charged. Indeed the sum of Rs. 500,

(1) (1907) I. L. R. 30 Mad. 328.

said to have been embezzled in November had, it is conceded, been, so to speak, restored by means of a credit entry in the cash-book made before the second sum of Rs. 500, referred to in the third charge, is supposed to have been embezzled; so that there is no connection between the third charge on the one hand and the first and second on the other.

In these circumstances, I am of opinion that there is a misjoinder which offends against the express provision, of the Code of Criminal Procedure, 1898, and would, as held by the Judicial Committee in the well known case of *Subrahmaniam Ayyar v. King-Emperor* (1), vitiate the trial.

No doubt the first and second of the charges laid could lawfully be tried together by virtue of the provision of section 235, sub-section (1), of the Criminal Procedure Code; for the alleged embezzlement of the 1st November, 1910, and the falsification cloaking it, would seem to have been so connected together as to form the same transaction. In truth, the alleged breach of trust was apparently effected by means of the alleged falsification.

Again, the second and third charges, each being in respect of an offence punishable under section 477A of the amended Penal Code, are obviously made triable together by section 234 of the Criminal Procedure Code.

But although the first and the second charges could properly be tried together, and the second and the third charges could likewise be joined at one trial, *non constat*, as it seems to me, that all three are triable simultaneously. The joinder of the three at one trial must (see section 233 of the Criminal Procedure Code) be brought within the scope of either section 234, or section 235, or section 236, or section 239 of the Code,

(1) (1901) I. L. R. 25 Mad. 61 : L. R. 28 I. A. 257.

1912  
EMPEROR  
v.  
JIBAN  
KRISHN  
BAGCHI.  
CARNDUFF  
J.

1912  
EMPEROR  
v.  
JIBAN  
KRISTO  
BAGCHI.  
CARNDUFF  
J.

and I can find nothing in any of those sections to justify the joinder of the third charge with the first. *Ergo*, the first charge cannot be tried along with the third, and either the first or the third must go.

I may add that I have examined a number of precedents in this Court, and find that in one instance, in August, 1902, an accused person was charged on six counts with three separate embezzlements under section 408 of the Penal Code and with three corresponding falsifications under section 477A, and was convicted on each count. But the point now raised was apparently not then taken; and in August last, when a prisoner was committed for three different acts of criminal breach of trust and also for forgery and falsification in connection with one of the three, the charges of forgery and falsification were withdrawn by the prosecution. It can hardly, therefore, be said that the view I have taken is opposed either to practice or to authority in this Court, while it is in consonance with the ruling of the Madras High Court relied upon by Mr. Ghose.

My decision being in Mr. Ghose's favour, his suggestion that I should reserve the point under clause 25 of the Letters Patent of 1865, need not, of course, be considered.

E. H. M.

## APPELLATE CIVIL.

*Before Mookerjee and Beachcroft JJ.*

BHIMA ROUT

v.

DASARATHI DASS.\*

1912

July 2.

*Parties—Religious Endowment—Suit against the sole surviving member of the Committee and the Superintendent of a temple—Death of the sole surviving member—Substitution of the adopted son—New Committee added as party—Cause of action, abatement of—Civil Procedure Code (Act V of 1908) O. XLI, r. 20, O. XXII, r. 10, O. I r. 10.—Religious Endowments Act (XX of 1863) s. 14.*

A suit, brought against the sole surviving members of the committee of management appointed under section 3 of the Religious Endowments Act 1863 and against the superintendent of a temple, for their removal from the committee and from the office of superintendent, respectively, was dismissed by the District Judge. Pending the appeal, the 1st defendant died and his adopted son was brought on the record as a party by the plaintiffs. Subsequently, a new committee was appointed and added also as a party, and the appeal was proceeded with against the adopted son, the superintendent and the new committee.

*Held*, that the relief against the 1st defendant was purely personal and that the cause of action did not survive against his adopted son.

*Held*, also, that the members of the new committee should not have been added as parties respondents.

*Kashi v. Sadashin Sakharam Shet* (1) referred to.

*Held*, further, that the suit could not be maintained as against the 2nd defendant alone, and that the appeal, as now constituted, was incompetent.

APPEAL by Bhima Rout and Chakradhar Panda, the plaintiffs.

On the 12th February 1904 Bhima Rout and Chakradhar Panda, who were two of the *shebaks* of a

\* Appeal from Original Decree, No. 292 of 1907, against the decree of J. J. Platel, District Judge of Cuttack, dated July 8, 1907.

1912  
BHIMA ROUT  
v.  
DASARATHI  
DASS.

certain temple dedicated to the idol "Sarala" at Kutila in the district of Cuttack, filed a petition for permission to bring a suit under sections 14 and 18 of the Religious Endowments Act, 1863, against the members of the committee of management and against the superintendent of the said temple for their removal from the committee and from the office of superintendent, respectively. At the time of the filing of this application, the committee of management, which had been appointed under section 3 of the Religious Endowments Act, 1863, consisted of three members, one of whom died and another resigned after the application was filed. On the 10th January 1905, the permission prayed for was accorded, and on 31st January the same year the plaintiffs filed their plaint against Dasarathi Dass and Durga Prasad Singh, alleging, that they, the plaintiffs, were interested in the endowment of the idol "Sarala," that the said endowment was under the management of a committee appointed under the Religious Endowments Act, that the defendant No. 1, who was the sole surviving member of that committee, neglected his duties, that the defendant No. 2 claimed to be the superintendent of the said temple and has been acting as such without being formally appointed to the office and finally, that the defendant No. 2 has misappropriated the properties of the endowment, and praying, that the defendant No. 1 might be removed from the membership of the committee and the defendant No. 2 from the office of superintendent.

The defendants in their written statement denied the allegations on the merits, and defendant No. 2 further asserted that he was entitled to the office of the superintendent under a hereditary right.

On the 8th July 1907, this suit was dismissed by the District Judge. The plaintiffs, thereupon,

appealed to the High Court. During the pendency of the appeal, the defendant No. 1 died on the 28th June, 1910, and on the 2nd September, of the same year, his adopted son, Saroda Charan Das, was brought on the record. On the 24th January, 1911, a new committee was appointed unders. 7 of the Religious Endowments Act, 1863. On the 4th March, 1912, the plaintiffs having applied *ex parte* to the High Court for an order under Order XLI rule 20 of the Code of Civil Procedure, 1908, the members of the new committee were added as respondents and notice was directed to issue upon them.

*Babu Provash Chandra Mitra* and *Babu Susil Madhab Mullick*, for the respondent Durga Prasad Singh, took a preliminary objection that this appeal had become incompetent and could not be proceeded with. The cause of action against the first defendant was entirely personal and the right to sue him did not survive against his adopted son. The suit, therefore, must abate: see Order XXII rule 1 of the Code of Civil Procedure, 1908. Furthermore, the endowment in question was under section 3 of the Religious Endowments Act, 1863, and this is evidenced by the fact that a committee was appointed to perform the duties imposed on it under section 7 of the Act. Under section 12 the property of the endowment is vested in the committee as trustee. There is a second class of endowments governed by sections 4 and 13 of the Act. Suits brought under section 14 affect both classes and, if brought against the superintendent alone, must be a suit against him in his capacity as trustee of the property vested in him under section 4. There cannot be a suit against the superintendent alone where the property is not vested in him, but in the committee as trustee. In case of an endowment where a committee has been appointed, the committee becomes the

1912  
BHIMA ROUT  
v.  
DASARATHI  
DASS

1912  
 BHIMA ROUT  
 v.  
 DASARATHI  
 DASS.

principal party, against whom substantial relief must be sought, the superintendent being made merely a *pro forma* defendant. The superintendent is appointed by the members of the committee and is under their control, being removable by them for misconduct, or for other good reason. This appeal, which is against the superintendent alone, must consequently fail.

*Babu Ganoda Charan Sen* and *Babu Ramesh Chandra Sen*, for the appellants. Under Order XLI, rule 20 of the Code of Civil Procedure, 1908, I am entitled to bring the members of the new committee as parties. As members of the committee, they are interested in the proper administration of the trust (see sections 7 and 13 of the Religious Endowments Act, 1863) and the Court may at any stage of the proceedings add them as parties. [*Per Curiam*: This is not a suit for administration of the trust.] This is a suit under section 14 of the Religious Endowments Act, which empowers any person or persons interested in the temple to proceed against the superintendent alone, even where the committee appointed under section 3 of the Act is vested with the powers of the Board of Revenue and has property transferred to it. But it is not clear from the records that the members of the committee were appointed under section 3 of the Religious Endowments Act. Section 12 does not mean that the committee is to be the trustee of the trust property. The trustee is not the Board of Revenue and no section lays this down. Section 11 clearly states that a member of a committee cannot bring a suit. The property never vested in the Board of Revenue as trustee. The powers given to the Board of Revenue by Regulation XIX, 1810, of the Bengal Code, and Regulation VII, 1817, of the Madras Code, were powers of superintendence. [*Per Curiam*: The question is,



whether section 14 authorizes a suit against the trustee where there is a committee.] Section 14 is not a bar to a suit against the trustee, where the members of the committee are brought on the record. [*Per Curiam*: You had no cause of action against them.] If the trust property is vested in the committee, then under section 14 without the committee being made a party, the suit could not be proceeded with. The mere fact of there being a committee does not bring this case under section 3, and this case must not be so regarded. Unless section 14 is an absolute bar against this suit, it must proceed in the interest of the public.

1912  
BHIMA ROUT  
v.  
DASARATHI  
DASS.

MOOKERJEE AND BEACHCROFT, JJ. This appeal is directed against the decree of dismissal in a suit commenced by the plaintiffs under section 14 of the Religious Endowments Act of 1863. The case for the plaintiffs is, that they are interested in the endowment of Sarala Thakurani at Kutila in the district of Cuttack, that the endowment was under the management of a committee appointed under the Religious Endowments Act of 1863, that the sole surviving member of that committee (the first defendant) had neglected his duties and that the second defendant, who claimed to be the *paricharak* or superintendent of the temple, though he had never been formally appointed to the office, had misappropriated the properties of the endowment. Upon these allegations the plaintiffs prayed that the first defendant might be removed from the committee and the second defendant from the office of superintendent. The suit was defended by both the defendants. The allegations on the merits were denied by both, and the second defendant further asserted, that he was entitled to the office of superintendent under a hereditary right.

1912  
BIHMA ROUT  
v.  
DASARATHI  
DASS.

Five issues were, thereupon, raised; one of which was, whether the second defendant had acquired a hereditary right to the *paricharakship* of the endowment. Another issue related to the merits of the case, namely, whether the allegations of neglect of duty and misappropriation were *bond fide* and true. The third raised the question, whether the plaintiffs had any cause of action specially against the first defendant. No objection was taken, however, to the frame of the suit, and it does not appear to have been urged that the second defendant was not a necessary party to the litigation. The suit was tried out on the merits and dismissed by the District Judge, on the 8th July 1907. During the pendency of the appeal by the plaintiffs in this Court, the first defendant died on the 28th June 1910. On the 2nd September following, his adopted son, Saroda Charan Das, was brought on the record. On the 24th January 1911, a new committee was appointed under section 7 of the Religious Endowments Act of 1863. Thereupon, on the 4th March 1912, the plaintiffs applied to this Court for an order under rule 20 of Order XLI to the effect that the members of the new committee might be added as defendants respondents. This application was granted *ex parte* and notice was directed to issue upon the added respondents. At the hearing of this appeal, the added respondents have not entered appearance nor has anybody appeared on behalf of the adopted son of the first defendant. But on behalf of the second defendant, a preliminary objection has been taken that, in the events which have happened, the appeal has become incompetent and ought to fail on that ground. In our opinion, this contention is well founded and must prevail.

It is clear at the outset that the adopted son of the first defendant ought not to have been brought on the

record. The first defendant was sued in his character as a member of the committee appointed under the Religious Endowments Act of 1863. The relief claimed against him was purely personal, namely, his removal for neglect of duty. This cause of action did not survive against his adopted son. It is equally plain that an order for the addition of the members of the new committee as respondents should not have been made. It is obvious that rule 20 of Order XLI has no application to this case. That rule applies only to cases, where, at the hearing of the appeal, the Court is satisfied that a person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal; the Court may, in such a contingency, adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent. An order under rule 20 can, consequently, be made only at the hearing of the appeal. Apart from this difficulty, it is plain that the person who can be made respondent under that rule is a person who was a party to the suit in the Court from whose decree the appeal has been preferred. The members of the committee who are sought to be added as respondents, were admittedly not parties to the litigation in the Court below. Consequently, the order cannot be supported under the rule to which our attention has been drawn. It has been argued, however, on behalf of the appellants that the order in question might have been made, not under rule 20 of Order XLI nor under rule 10 of Order 22, but under Order 1 rule 10 of the Code. That rule authorizes the Court, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, to order that the name of any person whose presence before the

1912

BIRMA ROYT

v.

DASARATHI  
DASS

1912  
BHIMA ROUT  
v.  
DASARATHI  
DASS.

Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. No doubt, as pointed out in the case of *Kashi v. Sadashiv Sakhararam Shet* (1), the Court may in the exercise of its powers under this rule bring before the Court a person who is a stranger to the litigation. But it is plain that in the case before us, an order under this rule ought not to be made, because there is no cause of action upon the plaint as framed against the members of the new committee. It is suggested, however, that their presence before the Court is necessary in order that an effective order for dismissal of the second defendant may be made. But it would be obviously unfair to the members of the new committee to bring them before the Court for such a purpose, when they have not been offered any opportunity to defend the suit. They cannot rightly be held bound by the evidence adduced at a time when they had no concern with the religious institution, of which they are now the committee under the Religious Endowments Act of 1863. We hold, accordingly, that the members of the new committee should not have been added as parties respondents and we direct that the adopted son as also the members of the committee be discharged from the record of this appeal. The appeal must proceed, if at all, as against the second defendant alone, and this raises the question whether the appeal, as now constituted, can be maintained.

On behalf of the appellants it has been argued that the appeal is maintainable, because the suit might originally have been instituted against the second defendant alone under section 14 of the Religious Endowments Act of 1863. To determine the validity of this contention, it is necessary to analyse briefly the

provisions in the preceding sections of the Statute. Sections 3 and 4 refer to two distinct classes of religious establishments. Section 3 deals with cases in which, at the time of the commencement of the Act, the mosque or temple or other religious establishment was one to which the provisions of Bengal Regulation XIX of 1810 and Madras Regulation VII of 1817 applied, and the mosque or temple or other religious establishment was an institution in which the nomination of the trustee, manager or superintendent thereof was vested in or might be exercised by the Government or any public officer, and the nomination of such trustee, manager or superintendent was subject to the confirmation of the Government or any public officer. Section 4, on the other hand, deals with cases of religious establishments in which the nomination of the trustee, manager or superintendent did not vest in nor was exercised by or was subject to the confirmation of the Government or any public officer. In the former class of cases, covered by section 3, the course to be followed is outlined in sections 7, 8, 9, 10, 11 and 12. In the latter class of cases, covered by section 4, the duty of the trustee, manager or superintendent is defined by section 13. In the class of cases covered by section 3, provision is made for the appointment of a committee to whom the property is transferred under section 12. In the case of endowments covered by section 4, the property is transferred to the trustee, manager or superintendent by that very section itself. It is clear, therefore, upon a review of these sections, that a well-marked distinction was observed by the Legislature between two classes of cases, namely, first, the class in which the trustee, manager or superintendent was, to put it briefly, under the control of the Board of Revenue and, subsequently, under the control of the committee

1912

PHINA ROU  
v.  
BASARATHI  
DASS.

1912  
BHIMA ROUT  
v.  
DASARATHI  
DASS.

appointed under the Statute ; and secondly, the class in which the trustee, manager or superintendent was not subject to the control of the Board of Revenue. We have now to examine the provisions of section 14 which runs as follows: "Any person or persons interested in any mosque, temple, or religious establishment, or in the performance of the worship or of the service thereof, or the trust relating thereto, may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court, the trustee, manager or superintendent of such mosque, temple, or religious establishment, or the member of any committee appointed under the Act, for any misfeasance, breach of trust, or neglect of duty, committed by such trustee, manager, superintendent, or member of such committee in respect of the trusts vested in, or confided to, them respectively." With reference to this provision, it has been argued on behalf of the appellants that a suit is maintainable as against the trustee, manager or superintendent even in a case when a Committee has been appointed under section 3 read with section 7. On behalf of the respondent, this position has been controverted, and it has been argued that in a case of this description the only suit maintainable is against the committee, although it may be conceded that in a suit so instituted the trustee, manager or superintendent may be joined as a *pro forma* defendant, while the substantial relief is claimed as against the committee. It has further been contended that the suit against the trustee, manager or superintendent contemplated by section 14 is a suit against a trustee, manager or superintendent to whom the property has been transferred under section 4. In our opinion, this contention is obviously well-founded. The Legislature could not have intended, that, where there is a committee which controls

the trustee, manager, or superintendent, a suit may be instituted not merely against the committee, but independently of the committee, against the trustee, manager, or superintendent, for his removal. The intention of the Legislature must have been to regulate and control the management of the endowment through the committee. If the members of the committee tolerated an unsuitable person as trustee, manager, or superintendent, such conduct on their part would amount to neglect of duty and would make them amenable to the jurisdiction of the Court. In the present case, therefore, the suit could not have been instituted against the second defendant alone. But it has been argued on behalf of the appellants that the materials on the record are not sufficient to show that the endowment is of the character mentioned in section 3 of the Religious Endowments Act of 1863. There is some force in this contention. But, as was pointed out in the case of *Ponduranga v. Narappa* (1), the circumstance that a committee has been appointed under section 3 and the committee has worked for many years without protest or challenge, is *prima facie*, evidence that the endowment is of the character described in section 3 of the statute. We must, therefore, proceed on the assumption that the second defendant, described as the superintendent of the endowment, is under the control of the committee appointed under the provisions of section 7. He is, consequently, as has been contended by his learned vakils, removeable by them for good reason. This position is supported by a long series of decisions, amongst which may be mentioned those of *Wasik Ali Khan v. Government* (2), *Wasik Ali v. Government* (3), *Ram Charan Das v. Chutter Bhoji* (4), *Chinna Rangaiyengar*

1912  
BHIMA ROUT  
v.  
DASARATHI  
DASS.

(1) (1889) I. L. R. 12 Mad. 366.

(3) (1836) 6 Mac. S. R. 130 N. E.

(2) (1834) 5 Mac. S. R. 363, O. E.

(4) (1845) 7 Mac. S. R. 205 O. E.

1912  
 BHIMA ROUT  
 v.  
 DASARATHI  
 DASS.

v. *Subbraya Mudali* (1), *Ramiengar v. Gnanasambanda Pandarasannada* (2), *Virasami Nayudu v. Subba Rau* (3) and *Seshadri Ayyangar v. Nataraja Ayyar* (4). The position might have been different if, as in the case of *Local Agents of Hooghly v. Kishnanend* (5), the defendant had been a manager entitled to hold office under a hereditary right. In such a case, a question might have arisen, whether the committee could have been appointed at all under section 3 of the Religious Endowments Act, because a trustee, manager, or superintendent of this description would not be a trustee, manager, or superintendent as contemplated in that section. For the present, at any rate, however, we must assume that the endowment is of the description mentioned in section 3, and that the second defendant is removeable for good reason by the committee which has been appointed under the Act. Consequently, the inference follows, that the suit cannot be maintained as against the second defendant alone, and that the appeal as now constituted is incompetent.

The result is, that the appeal is dismissed, but under the circumstances without costs.

O. M.

*Appeal dismissed.*

- |                                   |                                 |
|-----------------------------------|---------------------------------|
| (1) (1867) 3 Mad. H. C. R. 334.   | (3) (1882) I. L. R. 6 Mad. 54.  |
| (2) (1867) 5 Mad. H. C. R. 53.    | (4) (1897) I. L. R. 21 Mad. 179 |
| (5) (1848) 7 Mac. S. R. 476 O. R. |                                 |



## APPELLATE CIVIL.

*Before Mookerjee and Holmwood JJ.*

GODHANRAM

1912

v.

Aug. 8

JAHARMULL PUGLIA.\*

*Principal and Agent—Suit for declaration of title to the benefits of a decree—Maintainability of the suit.*

Where an agent entered into a contract in his own name with a third party and brought a suit to recover damages for breach of the same and obtained a decree thereon, a suit, subsequently brought by the principal against the agent for declaration of title to the decree, was not maintainable.

The principal, before the suit was brought by his agent, might have adopted the contract made by the latter and sued on it; but if he did so, he was bound to adopt the contract *cum onere*.

*Udell v. Atherton* (1) and *Bristowe v. Whitmore* (2) approved.

He might also have intervened at any stage in the action which had been commenced by his agent.

*Sadler v. Leigh* (3) approved.

SECOND APPEAL by Godhanram Bhakat and Benimadhab Shaha, the defendants.

This was a suit brought by Jaharmull Puglia against Godhanram Bhakat, Benimadhab Shaha and Jagadiswar Mukherjee for the declaration of title to a decree. The facts were as follows: The plaintiff carried on business at Sainthia in the purchase and sale of sundry articles under the name and style of Kali

\* Appeal from Appellate Decree, No. 1746 of 1912, against the decree of Ashutosh Sarkar, Subordinate Judge of Birbhoom, dated June 24, 1912, affirming the decree of Hementa Kumar Haldar, Munsif of Suri, dated Feb. 25, 1911.

(1) (1861) 7 H. &amp; N. 172.

(2) (1861) 9 H. L. C. 391.

(3) (1815) 4 Camp. 195.

1912  
GODHANRAM  
v.  
JAHARMULL  
PUGLIA.

Das Raghunath Das. In 1898, he employed the defendant No. 1 to look after the said business at Sainthia and left him in sole charge thereof from 1903 to 1907, while the plaintiff himself attended to the business in Calcutta. During this period the defendant No. 1 entered into a contract with the defendant No. 3 for the purchase of paddy from the latter and paid him the money for delivery of the same. Upon the latter having failed to deliver the paddy in terms of this contract, the defendant No. 1 brought a suit in 1906 for compensation and on the 28th March 1908, obtained a decree against him. The plaintiff did not intervene in this suit. During the pendency of this suit, that is to say, in about October 1907, the plaintiff terminated the agency of the defendant No. 1. On the 16th May 1908, the defendant No. 1 assigned his right under the decree to the defendant No. 2. On the 4th February 1909, the suit by the defendant No. 1 against the defendant No. 3 was affirmed on appeal. On the 11th February 1909, the plaintiff brought the present suit for declaration of his title to the decree obtained by the defendant No. 1 against the defendant No. 3, alleging, that the money paid by the defendant No. 1 to the defendant No. 3 for the paddy as aforesaid was paid out of the funds of the firm during the term of his employment as agent of the plaintiff, that before the appellate decree was made, the defendant No. 1 sold the decree to the defendant No. 2, who was not a *bonâ fide* purchaser of the same for value, and that the sale was not valid, and praying for an injunction restraining the defendant No. 3 from paying any money into the hands of the defendant No. 1 or the defendant No. 2 in satisfaction of that decree and for withdrawal of the amount realised by the decree and deposited in Court. The defendants contested this claim contending that the suit as framed was not maintainable, that

the defendant No. 1 entered into the contract with the defendant No. 3 for the sale of paddy, not as the plaintiff's agent, but on his own behalf, and paid the money for it out of his own funds, in which the plaintiff never possessed any interest, that the defendant No. 1 had to sell the decree to the defendant No. 2, as he could not pay back the money borrowed from one Kali Ghosh for the prosecution of the suit, that the sale took place before there was any appeal, and that the purchase of the defendant No. 2 was *bonâ fide* and for consideration. Both Courts having decreed the suit, the defendants Nos. 1 and 2 appealed to the High Court.

1912  
 GODHANRAM  
 v.  
 JAHARMULL  
 PUGLIA.

*Babu Baranashibashi Mukherjee*, for the appellants. The question involved in this appeal is, whether a suit of this nature is maintainable. This was a suit for the declaration of title to a decree obtained by the defendant No. 1 against the defendant No. 3 during the period of employment of the former as agent of the plaintiff. My submission is, that the plaintiff's proper course was to have instituted a suit for general accounts against his agent the, defendant No. 1, instead of bringing a suit in this novel form. In the present suit the plaintiff sought to derive the benefit of a successful litigation by the defendant No. 1 against the defendant No. 3. This, I submit, he could not be permitted to do. His remedy lay in a suit for adjustment of accounts against the defendant No. 1, in which all the rights and liabilities of the parties could have been settled. But in this particular case the plaintiff had by his conduct waived or repudiated the contract between the defendant No. 1 and the defendant No. 3.

*Babu Manmatha Nath Mookerjee*, for the respondent. It was not possible to have brought a suit for account. This was a suit of a civil nature and, unless there was some provision of law express or implied to

1912  
 GODHANRAM  
 v.  
 JAHARMULL  
 PUGLIA.

prevent such a suit being brought, this suit was maintainable. The plaintiff's cause of action was, that the defendant No. 1 had no right to transfer this decree. His only remedy for claiming the benefit of the decree lay in a suit of the present nature. He could not have joined, either as plaintiff or as defendant, in the suit of the defendant No. 1 against the defendant No. 3, as the contract was not in his name at all and, therefore, it is idle to urge that the plaintiff ought to have been made a party in that suit: see the Contract Act (IX of 1872) ss. 230 and 231; *Gopal Das v. Badri Nath*(1) and *Mohendro Narain Chaturaj v. Gopal Mondul* (2).

MOOKERJEE AND HOLMWOOD JJ. This is an appeal on behalf of the first two defendants in a suit of a novel description. The events antecedent to the litigation are not in controversy and may be briefly narrated. According to the plaintiff, the first defendant acted as his agent from 1903 to 1907. The plaintiff had, in the name of Kali Das Raghunath Das, started and carried on a business which consisted in the purchase and sale of sundry articles. The first defendant, who was employed to look after this business, as agent of the plaintiff, advanced Rs. 300 to the third defendant for purchase of paddy. The latter failed to perform the contract; the result was that in 1906 the first defendant sued him for damages for breach of contract. During the pendency of this suit in the Court of first instance, the plaintiff terminated the agency of the defendant. He did not, however, himself intervene in the suit then pending which was tried in due course and decreed on the 28th March 1908. On appeal, this decree was affirmed on the 4th February 1909. In the interval, on the 16th

(1) (1904) I. L. R. 27 All. 361.

(2) (1890) I. L. R. 17 Cal. 769.

May 1908, the first defendant assigned his rights under the decree to the second defendant. Seven days after the termination of the appeal in that suit, the plaintiff commenced the present action for declaration that he was beneficially interested in the decree obtained by the first defendant against the third defendant and for an injunction to restrain the third defendant from paying any money into the hands of the first or the second defendant in satisfaction of that decree. The defendants resisted the claim on the ground that the suit as framed was not maintainable. They also contended that the first defendant was not the agent of the plaintiff, and, that, in any event, the second defendant was entitled to protection as a *bonâ fide* purchaser for value without notice of the rights, if any, of the plaintiff. The Courts below have found that the first defendant was the agent of the plaintiff, that the sum advanced by him to the third defendant belonged to his principal, and that the contract was made by him as agent and on behalf of the principal. It has also been found that the second defendant was in league with the first defendant and was not a *bonâ fide* purchaser for value without notice. In this view, the Courts below have made a decree in favour of the plaintiff. The decree obtained by the first defendant against the third defendant, has meanwhile, been realised, the money is now in deposit in Court, and the plaintiff asks for leave to withdraw this sum. On behalf of the first defendant, it is argued that the plaintiff is not entitled to maintain the suit as framed. In our opinion, this contention is well founded and must prevail.

It is not disputed that the first defendant as agent was liable to render accounts to the plaintiff of all his dealings in the various transactions carried on by him as agent on behalf of the plaintiff. But what is

1912  
GODHANRAM  
v.  
JAHARMULL  
PUGLIA.

1912  
GODHANRAM  
v.  
JAHARMULL  
PUGLIA.

argued is, that, in the absence of a special contract in that behalf, the plaintiff cannot be permitted to select capriciously a single transaction and claim the fruits thereof, without an adjustment of the rights and liabilities of the parties in relation to other transactions. This contention is manifestly sound. It is well-settled that when accounts are taken, the agent is bound to make over to the principal whatever sums he has realised on his behalf; but the agent is equally entitled to deduct expenses authorised by the principal and all proper expenses even though incurred for purposes not strictly legal. In the matter of this very transaction, if the plaintiff is entitled to the fruits of the decree, the defendant may equally claim to be remunerated for his services as agent, and to be reimbursed the litigation expenses. But the plaintiff does not offer in the present litigation to reimburse or remunerate the defendant; he merely claims the entire sum realizable under the decree obtained by his agent against the third defendant; this demand is clearly untenable. The plaintiff might possibly have adopted the contract made by his agent and sued on it; but if he did so, he was bound to adopt it *cum onere* or not at all. As was observed by Baron Wilde in *Udell v. Atherton* (1), whatever his previous authority to the agent, whatever his innocence, the principal must adopt the whole contract including the statements and representations which induced it or repudiate the contract altogether. To the same effect is the observation of Lord Cranworth in *Bristow v. Whitmore* (2), "where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burthens." It was, consequently, open to the plaintiff, before the

(1) (1861) 7 H. & N. 172.

(2) (1861) 9 H. L. C. 391.

suit was brought by the first defendant, to have commenced an action himself for breach of contract against the third defendant. He might also have, as pointed out in *Sadler v. Leigh* (1), intervened at any stage in the action which had been commenced by his agent. But though, as found by the Courts below, he had full knowledge of the commencement and progress of the litigation by the first defendant against the third defendant, he did not adopt either of the courses open to him. The reason is obvious; if the first defendant had been unsuccessful, the plaintiff would have been free to urge, whether unsuccessfully or not, it is immaterial to discuss, that he was not liable for the costs of the litigation. When that suit has successfully terminated, he turns round and contends that he is entitled to the benefit of the litigation but does not offer to bear the burden of costs. The claim is so obviously unjust that no Court will seriously entertain it, and has only to be stated to be repudiated as wholly untenable.

The result is that this appeal is allowed, the decree of the Court below discharged and the suit dismissed; but we direct each party to bear his own costs throughout the litigation.

O. M.

*Appeal allowed.*

(1) (1815) 4 Camp. 195.

1912  
GODHANRAM  
v.  
JAHARMULL  
PUGLIA.

1912  
GODHANRAM  
v.  
JAHARMULL  
PUGLIA.

argued is, that, in the absence of a special contract in that behalf, the plaintiff cannot be permitted to select capriciously a single transaction and claim the fruits thereof, without an adjustment of the rights and liabilities of the parties in relation to other transactions. This contention is manifestly sound. It is well-settled that when accounts are taken, the agent is bound to make over to the principal whatever sums he has realised on his behalf; but the agent is equally entitled to deduct expenses authorised by the principal and all proper expenses even though incurred for purposes not strictly legal. In the matter of this very transaction, if the plaintiff is entitled to the fruits of the decree, the defendant may equally claim to be remunerated for his services as agent, and to be reimbursed the litigation expenses. But the plaintiff does not offer in the present litigation to reimburse or remunerate the defendant; he merely claims the entire sum realizable under the decree obtained by his agent against the third defendant; this demand is clearly untenable. The plaintiff might possibly have adopted the contract made by his agent and sued on it; but if he did so, he was bound to adopt it *cum onere* or not at all. As was observed by Baron Wilde in *Udell v. Atherton* (1), whatever his previous authority to the agent, whatever his innocence, the principal must adopt the whole contract including the statements and representations which induced it or repudiate the contract altogether. To the same effect is the observation of Lord Cranworth in *Bristow v. Whitmore* (2), "where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burthens." It was, consequently, open to the plaintiff, before the

(1) (1861) 7 H. & N. 172.

(2) (1861) 9 H. L. C. 391.



suit was brought by the first defendant, to have commenced an action himself for breach of contract against the third defendant. He might also have, as pointed out in *Sadler v. Leigh* (1), intervened at any stage in the action which had been commenced by his agent. But though, as found by the Courts below, he had full knowledge of the commencement and progress of the litigation by the first defendant against the third defendant, he did not adopt either of the courses open to him. The reason is obvious; if the first defendant had been unsuccessful, the plaintiff would have been free to urge, whether unsuccessfully or not, it is immaterial to discuss, that he was not liable for the costs of the litigation. When that suit has successfully terminated, he turns round and contends that he is entitled to the benefit of the litigation but does not offer to bear the burden of costs. The claim is so obviously unjust that no Court will seriously entertain it, and has only to be stated to be repudiated as wholly untenable.

The result is that this appeal is allowed, the decree of the Court below discharged and the suit dismissed; but we direct each party to bear his own costs throughout the litigation.

O. M.

*Appeal allowed.*

(1) (1815) 4 Camp. 195.

1912

GODHANHAM

7.

JAHARNULL.

PUGLIA.

## APPELLATE CIVIL.

*Before Jenkins C.J. and Chatterjee J.*

1912

Aug. 16.

BISWANATH PERSHAD MAHTA

v.

JAGDIP NARAIN SINGH.\*

*Mortgage—Entire interest mortgaged for family purposes—Liability of minor son when authority may be presumed—Alienation—Onus of Proof—Evidence Act (I of 1872), s. 106—Transfer of Property Act (IV of 1882), ss. 85, 90—Civil Procedure Code (V of 1908), O. XXXIV, r. 6.*

Where a mortgage purports to charge the entire interest in a property, and the mortgage-money was advanced for legitimate family purposes, express or implied authority of minor co-parceners may be implied, and the mortgage may be enforced against the entire family interest.

*Suraj Bansi Koer v. Shen Persad Singh* (1) referred to.

Authority to mortgage may also, according to the peculiar circumstances of a case, be implied even in cases where the mortgage-money was not advanced for legitimate family purposes.

A mortgage is an alienation, even though it is for a very particular purpose, *e.g.*, as security only for the amounts drawn or paid on account of instalments of rent.

*Gharibullah v. Khalak Singh* (2) referred to.

Where on the one side it is proved that the whole of the mortgage-money, with the exception of a very small portion of it, was advanced for legitimate family purpose (and there is, therefore, a sufficient foundation for a decree for sale on the mortgage), and on the other side it is not shown that the small portion of the debt was not for any immoral purpose, the smaller item may be regarded as a debt of the father binding on the son.

\* Appeal from Original Decree, No. 188 of 1910, against the decree of Tarak Nath Dutt, Subordinate Judge of Patna, dated Aug. 27, 1909.

(1) (1879) I. L. R. 5 Calc. 148 ;      (2) (1903) I. L. R. 25 All. 407 ;  
L. R. 6 I. A. 88.      L. R. 30 I. A. 165.

*Hunoomanpersaud Panday v. Munraj Koonveree* (1), *Lachman Dass v. Giridhar Choudhry* (2), *Maheśwar Dutt Tewari v. Kishun Singh* (3), *Kishun Pershad Choudhry v. Tipun Pershad Singh* (4), *Lala Suraj Prasad v. Golab Chand* (5) referred to.

1912

BISWANATH  
PERSHAD  
MAHTA

v.

JAGDIP  
NARAIN  
SINGH.

APPEAL by Babu Biswanath Pershad Mahta and others, plaintiffs.

The plaintiffs in this suit sought to recover certain sums as principal and interest due on a *zamanatnama*, which is in the nature of a mortgage-bond, executed in favour of the plaintiffs by defendant No. 1. Plaintiffs alleged that defendant No. 1 was the manager of the joint family of the defendants, that by executing the *zamanatnama* he had opened an account with the plaintiff's firm for the payment of *ticca* rent, etc., that defendant No. 1 had taken several amounts from the plaintiff's firm and had made several payments to it, that the principal sum of Rs. 5,000 and Rs. 3,554-10-8 yet remained due by the defendants, and that as defendant No. 2 was a minor when the account was opened and defendant No. 1 had opened transaction for the benefit of the defendant's family, defendant No. 2 was also liable for the debt.

Defendant No. 1 in his written statement stated that the defendant No. 2 was a minor. Defendant No. 2 did not appear. The Court decided the point against both the defendants and decreed the suit after contest against the first defendant and *ex parte* against the other. The *ex parte* decree was set aside on the 17th December 1908. Defendant No. 2 filed his written statement on the 22nd January 1909, contending that as the loan was contracted for illegal and immoral purposes, the contending defendant was not bound to satisfy it, that it did not benefit the family, that the

(1) (1856) 6 Moo. I. A. 393 ;

18 W. R. 81n.

(2) (1880) I. L. R. 5 Calc. 855.

(3) (1907) I. L. R. 34 Calc. 184.

(4) (1907) I. L. R. 34 Calc. 735.

(5) (1901) I. L. R. 28 Calc. 517.

1912  
 BISWANATH  
 PERSHAD  
 MAHTA  
 v.  
 JAGDIP  
 NARAIN  
 SINGH.

claim was barred by limitation, that he was separate from defendant No. 1 when the debt was contracted, and that the *zamanatnama* sued on is not binding on him or on the family property.

The Subordinate Judge on a review of the authorities held that, as far as the contesting defendant was concerned, a money decree might be passed against him, but as the suit was instituted after six years from the due date, the suit so far as it concerned defendant No. 2 was barred by limitation. In the result the suit was dismissed against the said defendant No. 2 or against his share in the family property. The Subordinate Judge further overruled the contention of the plaintiffs that the whole case was now open for trial. The plaintiffs thereupon preferred this appeal.

*Babu Prabhashchandra Mitra* (*Babu Susheel-madhub Mallik* with him), for the appellants. The case was not properly tried in the lower Court. The Subordinate Judge treated the son as an ordinary co-parcener of a joint Hindu family governed by Mitakshara. The lower Court has directed its attention solely to the question whether or not the mortgagees had made proper inquiries before advancing the loans. That question, however, is of no importance whatever in deciding whether or not the defendant No. 2 (the son) is bound by the mortgage created by the father (the defendant No. 1). It is well settled that a son cannot escape liability, unless he succeeds in proving that the debt contracted by his father was immoral: *Girdharee Lall v. Kantoo Lall* (1). This ungracious defence, viz., that the debt was immoral, was taken in the lower Court in this case and has failed. The law laid down in *Girdhari Lall's* case (1) was followed in

(1) (1874) 14 B. L. R. 187; 22 W. R. 56; L. R. 1 I. A. 321.

many subsequent cases in which the son attempted to recover his share on the allegation that the debt contracted by the father was not binding upon the son : *Deendyal Lal v. Jugdeep Narain Singh* (1), *Suraj Bansi Koer v. Sheo Persad Singh* (2), *Nanomi Babuasin v. Modhun Mohun* (3), *Bhagbut Pershad Singh v. Girja Koer* (4). In the last mentioned case it was said : " It is not necessary for the creditors to show that there was a proper inquiry, or to prove that money was borrowed in a case of necessity." It cannot be gainsaid, therefore, that if the plaintiffs (appellants) had ignored the son altogether in their suit against the father, and if in execution of their decree had caused the entire property to be sold, the son could not have got back his share without proving that the debt contracted by the father was immoral. The same principle should govern this case also, because a mortgage is unquestionably an alienation : see the definition of " mortgage " in Transfer of Property Act ; see also *Gharibullah v. Khalak Singh* (5). It would be unreasonable to hold that a different principle should govern this case, because I was obliged to make the son a party to this suit by reason of the provisions of section 85 of the Transfer of Property Act. A Mitakshara son is a necessary party in such cases : *Lala Suraj Prosad v. Golab Chand* (6). The cases referred to in the last mentioned case show that a Mitakshara son was not a necessary party in mortgage suits before the Transfer of Property Act. The law has been materially altered in this respect since the Full Bench

1912

BISWANATH  
PERSHAD  
MARTTA  
c.  
JAGDIP  
NARAIN  
SINGH.

- (1) (1877) I. L. R. 3 Cal. 198 ;  
L. R. 4 I. A. 247.  
(2) (1879) I. L. R. 5 Cal. 148 ;  
L. R. 6 I. A. 88.  
(3) (1885) I. L. R. 13 Cal. 21 ;  
L. R. 13 I. A. 1.  
(4) (1888) I. L. R. 15 Cal. 717 ;  
L. R. 15 I. A. 99.  
(5) (1903) I. L. R. 25 All. 407 ;  
L. R. 30 I. A. 165.  
(6) (1901) I. L. R. 28 Cal. 517.

1912  
 BISWANATH  
 PERSHAD  
 MAHTA  
 v.  
 JAGDIP  
 NARAIN  
 SINGH.

decision in *Luchmun Dass v. Giridhur Chowdhry* (1). The learned Judges who decided the two cases *Maheswar Dutt Tewari v. Kishun Singh* (2) and *Kishun Pershad Chowdhry v. Tipan Pershad Singh* (3) did not take this fact into consideration. Hence the conflict of decisions in the last mentioned two cases, and which conflict is responsible for the wrong conclusion arrived at in the lower Courts in this case. The view taken in *Maheswar Dutt's* case (2), in so far as it lays down that the son cannot escape liability without proving that the mortgage debt was immoral, is the sounder view and supported by the Privy Council decisions cited above. In spite of the view taken in *Kishun Pershad's* case (3) to the effect that in such cases a personal decree only should be passed against the son, I am entitled to succeed in this case, as there is satisfactory evidence to prove that almost all the items of the moneys advanced to the father benefited the son, who was a minor at the time the moneys were advanced. The mortgagees have failed to prove benefit only in the small item of Rs. 600. The mortgage is binding upon the son on the assumption that the father as *karta* had implied authority: *Surai Bunsī Koer v. Sheo Persad Singh* (4). Though the mortgagees have failed to prove so, there can be little doubt that this sum also was so spent. The son has failed in proving that any portion of the debt was contracted for immoral purposes. The defendants did not produce their account books. The inference should be in my favour under the circumstances. I also rely upon section 106 of the Indian Evidence Act and upon *Hunoomanpersaud Panday v. Munraj Koonweree* (5). The son is therefore liable from this point of view also.

(1) (1890) I. L. R. 5 Calc. 855. (3) (1907) I. L. R. 34 Calc. 735.  
 (2) (1907) I. L. R. 34 Calc. 184. (4) (1879) I. L. R. 5 Calc. 148, 165.  
 (5) (1856) 6 Moo. I. A. 393.

*Babu Umakali Mukherji* (*Babu Bhudeb Chandra Roy* with him), for the respondents. The burden of proving that the money was spent for family necessity is upon the mortgagee, which the latter has not discharged in this case. There was no inquiry on the part of the mortgagee before advancing the money. The sons are no doubt liable, but there cannot be a mortgage decree against them, and six years' rule of limitation would apply: *Kishun Pershad Chowdhry v. Tipan Pershad Singh* (1). The case of *Suraj Bansi Koer v. Sheo Persad Singh* (2) does not decide the precise point raised in this appeal. The phrase 'antecedent debt' has no meaning. The bond, moreover, was only to secure payment of instalment of rent, and nothing else. The Full Bench case of *Luchmun Dass v. Giridhar Chowdhry* (3) is of questionable authority, and therefore the case may be referred to a Special Bench.

*Babu Prabhashchandra Mitra*, in reply.

*Cur. adv. vult.*

JENKINS C.J. The plaintiffs have brought this suit to realize a mortgage security executed in their favour by Babu Jagdip Narayan Singh, defendant No. 1. They have made defendants to the suit both Jagdip Narain Singh and his only son, Bindeswari Pershad Singh, it being their case that the son, who was a minor at the date of the mortgage, is as much bound by it so far as it creates a security on the property comprised in it, as the father by whom it was executed. The suit was dismissed as against the son and hence this appeal.

The mortgage, Ex. 1, is dated the 21st of November 1893, and to appreciate its meaning it should

(1) (1907) I. L. R. 34 Calc. 735. (3) (1880) I. L. R. 5 Calc. 855.

(2) (1879) I. L. R. 5 Calc. 148; L. R. 6 I. A. 88.

1912

BISWANATH  
PERSHAD  
MAHTA  
v.  
JAGDIP  
NARAIN  
SINGH.

1912

BISWANATH

PERSHAD

MAHTA

v.

JAGDIP

NARAIN

SINGH.

JENKINS

C.J.

be borne in mind that the mortgagees were a firm of bankers or *mahajans*.

It begins in these terms: "Whereas I, the declarant, have taken lease of certain mouzas and have to pay the rent thereof to the proprietors instalment by instalment; but the rent is not realized in due time from the tenants of the lease-hold mauzas, and the proprietors are always making pressing demands; therefore I have of my own accord and free will opened for the payment of the rent to the proprietors due on account of the lease-hold mauzas a *khata* for Rs. 5,000 bearing interest at the rate of Re. 1 per cent. per mensem with the firm of Babu Birkeshwar Lal Parmeswar Narain at Koochi Hiranand Sahu appertaining to Thana chawk Kalan, one of the quarters of Patna city, as per details given below."

Then there follow provisions regulating the details of the transaction. The first clause provides for two *chittas*, one to be kept in the bankers' place of business, and the other to remain with the mortgagor, and then says "all sums paid into and received from the *kothi* by me shall be entered in both the *chittas*." The succeeding clauses deal with interest, periodical adjustments, the closing of the transaction, and then the charge is created in these terms (read clause 7). The schedule to the mortgage describes the property, and from this description it is apparent that the instrument professes to charge the entire family interest in this property. This has not been disputed before us.

It is the plaintiff's case that the transaction has been closed, and that there is due to them on the balance of the account a sum of Rs. 5,000 for principal, after giving up Rs. 7-0-9, and Rs. 3,554-10-8 for interest.

The amounts which go to make up this sum of Rs. 5,000 are shown in a tabular form in the judgment



of the Subordinate Judge where nine items are shown totalling Rs. 6,279-10 in all, and extending from *Jeyt Sudi* 6th to *Magh Budi* 11th *Sambat* 1952.

The first two may be left out of consideration, as they are beyond the limits claimed by the plaintiffs.

The rest call for a brief explanation, excluding for the moment the last item of Rs. 600; it has been proved to my satisfaction, not merely by oral testimony but by documentary evidence, that is above all cavil that all these items were expended on legitimate family purposes, as, for instance, the payment of rent, the payment of Government revenue, and family marriage expenses. We have been taken through the items which go to show this with minute detail, but I do not propose to do more than state, as I have done, the general result of this investigation, as no argument was addressed to us in disparagement of this conclusion. The attempt to evade liability by pleading the immorality of defendant No. 1 has been as unsuccessful as it was unmeritorious, and it was particularly unmeritorious, for there is strong reason to think that defendant No. 1 is in reality the person responsible for the advancement of this defence.

It was argued that the mortgage was security only for the amount drawn or paid on account of instalments of rent, and, in support of this, reliance was placed on the recital I have read. But this (in my opinion) places too narrow a construction on the instrument: the recital explains how the mortgage became necessary, but it does not control its operative provision. The intention and effect of the instrument was, I think, to secure the balance from time to time due on the current account. The result then is this: the mortgage purports to charge the entire interest in the property, and, apart from the Rs. 600 with which I will later deal, the whole of the Rs. 5,000,

1912

BISWANATH  
PERSHAD  
MAHTA  
r.

JAGDIP  
NARAIN  
SINGH.

JENKINS  
C.J.

1912  
 BISWANATH  
 PERSHAD  
 MAHTA  
 v.  
 JAGDIP  
 NARAIN  
 SINGH.  
 JENKINS  
 C.J.

claimed as principal, was advanced for legitimate family purposes. Why then should not the mortgage be enforced against the entire family interest?

The law on this subject is thus stated by the Privy Council in *Surai Bunsî Koer v. Sheo Persad Singh*(1): "The right of co-parceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the Courts of India, and it cannot be said that there has been complete uniformity of decision respecting it. All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the co-parceners, and that such an authority will be implied, at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes."

This formulates a clear and precise principle, and it would seem to narrow the problem of the validity of a manager's alienation to this: had he an express authority, if not, had he an implied, authority? At the same time the passage indicates the kind of condition which would justify such an implication when it is pointed out that as against a minor co-parcener it may be implied, if there was a legitimate family purpose.

But I do not read this statement of the law as laying down that these are the only conditions under which authority can be implied; each case must be judged according to its own peculiar circumstances. It is true that the word *used* in this passage is *alienation*; but a mortgage is an alienation and none the less so because it is for a particular purpose; and this is recognised by the Transfer of Property Act.

(1) (1879) I. L. R. 5 Cal. 148, 165.

Moreover, this view has the sanction of the highest judicial authority, for a mortgage by a managing member has been upheld on this principle by the Privy Council, and in illustration of this I may refer to *Gharib-ullah v. Khalak Singh* (1).

No doubt in the present case the mortgage was executed before the advances were made, but I fail to see that this places any obstacle in the plaintiff's way, in view of the fact that the advances were all made for legitimate family purposes and the mortgage was a necessary part of the arrangement. And I hold that in the circumstances defendant No. 1 as the managing member had implied authority to execute the mortgage so as to make it unimpeachable by his minor son. It follows, then, that the alienation by way of mortgage is good, and that it can be enforced as a mortgage against the defendant No. 2 as well as against his father defendant No. 1.

So far I have dealt with the case apart from the item of Rs. 600: now it is necessary to consider how matters stand regarding this item.

The plaintiffs have been unable to show how it was expended: the defendants have refrained from throwing any light on the point, and yet it is difficult to suppose that they have not family books of account and available sources of information that would show what was done with this sum.

It has been forcibly argued that in view of all the circumstances the position would appear to be one where it would be reasonable to apply the provisions of section 106 of the Evidence Act and hold that as the mode of expenditure is especially within the knowledge of the defendants the burden of proving how it was made was on them: see *Hunoomanpersaud's case* (2).

(1) (1903) I. L. R. 25 All. 407 ;      (2) (1856) 6 Moo. I. A. 393, 418.  
L. R. 30 I. A. 165.

1912  
BISWANATH  
PERSHAD  
MAHTA  
v.  
JAGDIP  
NARAIN  
SINGH.  
JENKINS  
C.J.

1912

BISWANATH  
PERSHAD  
MAHTA

v.

JAGDIP  
NARAIN  
SINGH.JENKINS  
C.J.

But even if the plaintiffs cannot show that this sum was expended for a legitimate family purpose, on the other hand, the defendants have wholly failed to show that it was used for an immoral purpose. And so we have the position indicated in the case of *Luchmun Dass v. Giridhar Chowdhry* (1).

This is a determination of a Full Bench of this Court which has given rise to much discussion, and in token of this I need only refer to two recent but apparently discordant decisions: *Maheswar Dutt Tewari v. Kishun Singh* (2) and *Kishun Pershad Chowdhry v. Tipan Pershad Singh* (3).

On the strength of this Full Bench determination it is urged on behalf of the respondent that we cannot decide in the plaintiffs' favour without a reference to a Bench specially constituted. At most, however, this contention can only refer to the Rs. 600, and the plaintiffs say they would give up this amount rather than incur the delay and expense of a reference.

But is the reference necessary, having regard to the circumstances of this case? First, then it has to be seen what the Full Bench determined.

One of the questions propounded to them was this: "In the case of a Mitakshara family consisting of a father and one minor son where the father being the manager raises money by hypothecating certain ancestral family property by bonds, and it is not proved on the one hand that there was any legal necessity for his raising the money, nor on the other that the money was raised or expended for immoral or illegal purposes, or that the lender made any inquiry as to the purpose for which it was required, can the lender, the mortgagee, enforce by suit against the father and

(1) (1880) I. L. R. 5 Cal. 855.

the son the payment of his money by sale of the property during the father's lifetime?" The answer which was returned by the Full Bench was in these terms: "The mortgage itself upon which the money was raised could not be enforced, but the debt contracted by the father, being itself an antecedent debt within the meaning of the rulings of the Privy Council, and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property."

This answer has occasioned much discussion, but it is now the accepted view that it cannot mean that the mortgage is incapable of enforcement against the father to the extent of his share.

But even with this gloss the ruling is not free from difficulty.

If in execution of a decree against the father alone for a debt unconnected with any immoral or illegal purpose, a part of the family property is sold in execution, the son's obligation to pay his father's debts would of itself afford a sufficient answer to a suit brought by a son to recover the property. At the date of the Full Bench decision the result would have been the same, though the suit was for enforcement of a mortgage and the son was not a party to it. Since then, however, the Transfer of Property Act has been passed, and by section 85 it is provided: "Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: provided that the plaintiff has notice of such

1912

BISWANATH  
PEIRSHAD  
MAITTA  
P.  
JAGDIP  
NARAIN  
SINGH.

JENKINS  
C.J.





1912  
 BISWANATH  
 PERSHAD  
 MAHTA  
 v.  
 JAGDIP  
 NARAIN  
 SINGH.  
 JENKINS  
 C J

it was held that this section is compulsory. So a mortgagee must now in a suit on a mortgage of the joint property of a Mitakshara family executed by a father join as a party the executant's son, though he was a minor at the date of the instrument.

Such a son therefore is a person having an interest in the property comprised in the mortgage, and it is on that account alone that he is a necessary party. Moreover, it is only to a suit under Chapter IV of the Transfer of Property Act now reproduced by O. XXXIV, Civil Procedure Code, relating to the mortgage that he is a necessary party.

The purpose of joining the son is not to obtain a personal decree against him on the strength of his obligation to pay his father's debts, but primarily to give him an opportunity of redeeming as a person interested in the mortgaged property and incidentally to resist the suit as against himself on the ground that the character of the debt absolved him from any obligation. In this connection regard may be had to section 90 of the Transfer of Property Act now reproduced in O. XXXIV, r. 6 of the Civil Procedure Code.

That it was not necessary to make the son a party to such a suit before the Transfer of Property Act was passed, or where its provisions did not apply, is clear from the cases to which reference was made in *Lala Surai Prosad's* case (1). And though he was not a party, a decree could be passed for the sale of the entirety, of the mortgaged property. The son's remedy in such a case was that he could sue to recover the property, provided he could show that the debts were contracted for immoral purposes and the purchaser had notice that they were so contracted: *Surai Buns*

(1) (1894) I. L. R. 28 Calc. 517.



*Koer's* case (1). Thus it will be seen that the law has been materially modified by Statute and Statutory rule since the Full Bench decision. But more than that, we have in this case facts which take it outside the scope of the Full Bench decision. Here the sums covered by the mortgage were, with the exception of Rs. 600 advanced for a legitimate family purpose, and so there is a sufficient foundation for a decree for sale on the mortgage. And though it is not shown that the Rs. 600 was for a legitimate family purpose, it certainly was not for any immoral purpose, and in the circumstances I think it may be regarded as a debt of the father binding on the son, and that the second defendant cannot be permitted to redeem the mortgage, except on the terms of paying off the Rs. 600 as well as the balance of the Rs. 5,000 which is shown to have been contracted for legitimate family purposes.

The decree of the Subordinate Judge must therefore be reversed, and a mortgage decree passed on the footing of Rs. 5,000 being due for principal. Unless the parties agree, there must be an account of what is due for interest at the mortgage rate. On payment of the amount so found by the defendants or either of them there will be the usual direction for delivery up of the documents, and if required for retransfer. In default of payment within six months of this decree or the ascertainment of interest, whichever may be the later date, there will be a decree for sale and application of the proceeds. The plaintiffs must have their costs of the suit and appeal which will be added to their security.

N. R. CHATTERJEA J. I agree.

S. M.

*Appeal allowed.*

1912

BISWANATH  
PERSHAD  
MAHTA

v.

JAGDIP  
NARAIN  
SINGH.

JENKINS  
C.J.

## CRIMINAL REVISION.

*Before Holmwood and Imam JJ.*

1912  
 Aug. 16.

GANPAT RAI

v.

EMPEROR.\*

*Petroleum—Keeping in possession a quantity exceeding the maximum allowed by law—Liability of a licensee for the acts of his servant or agent in the absence of a finding of guilty knowledge on his own part—Petroleum Act (VIII of 1899), ss. 11 and 15(a).*

A licensee is not, in the absence of a finding by the Court that he knew that more than 500 gallons of petroleum were being transported at one time on his license, and that he allowed the same to take place with such knowledge, by his servant, criminally liable, under ss. 11 and 15(a) of the Indian Petroleum Act (VIII of 1899), for the acts of the latter done in contravention of the law. Though the Act provides a personal penalty, the only person that can be punished is the one who keeps petroleum, or carries it about or puts more than 500 gallons at one place.

THE petitioner, Ganpat Rai, who resided at Ranchi, was the senior proprietor and licensee of a firm called "Chunilal Ganpat Rai" dealing in petroleum, with a branch shop at Daltongunge. The business was carried on at the latter place by an agent or manager named Sheo Bhagwan. On the 5th January 1912 a complaint was lodged against the petitioner, under s. 5 of the Indian Petroleum Act (VIII of 1899), for storing dangerous petroleum exceeding 40 gallons. The case was tried by Moulvi A. Rashid, Deputy Magistrate of Palamau. The defence of the petitioner was that he had left the management of the Dalton-gunge shop entirely in the hands of Sheo Bhagwan,

\* Criminal Revision, No. 1031 of 1912, against the order of D. H. Kingsford, Judicial Commissioner of Chota Nagpur, dated May 13, 1912

and had not authorized the latter to import or keep petroleum in contravention of the law, and that the latter used to import petroleum for other firms and also on his own account in the name of the petitioner's firm of which facts he, the petitioner, had then no knowledge or information. Sheo Bhagwan was examined as a prosecution witness and stated that he had transported more than 150 tins, equivalent to 500 gallons, at a time for the petitioner. The Magistrate convicted the latter on three charges under ss. 11 and 15(a) of the Petroleum Act, by his judgment, dated the 4th April 1912, and sentenced him on each count to a fine of Rs. 50, and in default to 15 days' simple imprisonment. The material portions of his judgment were as follows :—

The facts on which the charge is established are not controverted. The only question that is raised for decision is whether the accused proprietor is criminally liable for the acts of his agent done in his representative capacity. I have been referred to a number of rulings on the subject by the learned pleader for the defence. None of these, however, is quite on all fours with the circumstances of the present case. The question whether a master is criminally liable for the acts of his servant is, I venture to think, a question of fact rather than of law. To make the master liable there must be evidence of express direction to do the act, or connivance on his part. In the present case, although there is nothing to show direction on the part of the accused, it is impossible to believe that he never connived at it for the practice has been going on from a long time and nothing has been shown to prove disapprobation, on the part of the accused, of his agent's act. The act done by the agent was in his representative capacity as appears from his endorsement on the delivery book. On the three dates specified above the firm of Chuni Lal Ganpat Rai had in its possession petroleum in excess of the maximum prescribed by law, and it does not matter whether the petroleum was stored in one shop or at two different places. The petroleum kept at Ram Lachan Saho's shop for commission, of course, did not bar the possession of the accused as head of the firm.

An application to the Judicial Commissioner of Chota Nagpur, under s. 438 of the Criminal Procedure Code, was rejected by him on the 13th May 1912. The

1912  
GANPAT  
RAI  
v.  
EMPEROR

1912  
GANPAT  
RAI  
v.  
EMPEROR.

petitioner then moved the High Court and obtained the present Rule on the grounds, *first*, that there being no finding or evidence of knowledge or direction on the petitioner's part of the exportation or storage of petroleum, by his servant, in excess of the quantity allowed by law, the conviction was bad; *secondly*, that the petitioner was not criminally liable for the illegal act of his servant, when the latter was not empowered by the firm to keep or sell more than 150 tins; and, *thirdly*, that the petitioner was not so liable when the petroleum imported in excess of the prescribed quantity, by the servant, was not for the petitioner's firm but for other firms also and in contravention of the petitioner's directions.

*Babu Rajendra Prosad*, for the petitioner.

*Babu Srish Chandra Chowdhury*, for the Crown.

HOLMWOOD AND IMAM, JJ. We are of opinion that this Rule must be made absolute upon the grounds on which it was issued.

The law (Act VIII of 1899) lays down in section 11:—"No quantity of petroleum exceeding 500 gallons shall be kept by any one person, or on the same premises, or shall be transported, except under, and in accordance with, the conditions of a license granted under this Act."

Now, it is found that a person named Sheo Bhagwan, who was an agent of the petitioner and also apparently agent of several other persons in the sale of petroleum, imported or rather transported (for we do not know how this petroleum was imported into this country) more than 150 tins at a time, and we are told that 150 tins is equal to the maximum allowed, viz., 500 gallons. If, therefore, Sheo Bhagwan transported more than 150 tins, he is guilty of transporting petroleum in contravention of the Act. But we are

unable to see that the principal, Ganpat Rai, is responsible for this, unless there is a finding that he knew that more than 150 tins were being transported at one time on his license, and allowed this to take place with such knowledge. Now, there is no finding to that effect.

The agent, Sheo Bhagwan, seems to have been allowed to give evidence, and, of course, being himself the guilty person, he would naturally try to shift the blame on to his principal. He says that he did transport more than 150 tins for his principal at one time and despatched them in parcels of 150 gallons to the dealers. Still we are unable to say, there being no finding to that effect, that the petitioner was in any way responsible for this illegal proceeding.

The second point depends upon the first, and has already been decided by us, namely, that the petitioner cannot be held criminally liable for any illegal act of the said agent. There is no provision, as far as we can see, in this Act as there is in the Excise Act and in the Motor Car Act, which makes the principal responsible for the acts of his agents or servants, and nothing can be read into the law which is not to be found in the law.

As regards the third ground, we have already referred to that. It relates to the contention of the petitioner that Sheo Bhagwan was agent for other firms as well as for the petitioner, and that it is impossible for the petitioner to know how much petroleum was imported for his use and how much for that of the others. It is argued by the learned vakil for the Crown that, as Ganpat Rai took commission or profit of one pice per tin on every tin sold, he must have been aware of how many tins were in the possession of his agent at one time. This does not seem to us to be at all a necessary conclusion. A stock of 150 tins

1912  
GANPAT  
RAI  
v.  
EMPEROR.

1912  
 GANPAT  
 RAI  
 v.  
 EMPEROR.

may be sold out gradually and be replenished from time to time, and it is impossible for the absent principal to know whether at one time his agent had 150 tins on his behalf or on behalf of the other firms. Even though the Act provides a personal penalty, we think the only person that can be punished is the one who keeps petroleum or carries it about or puts more than 150 tins at one place. For these reasons, the Rule must be made absolute, and the conviction and sentence set aside. The fines if paid must be refunded.

E. H. M.

*Rule absolute.*

## APPELLATE CRIMINAL.

*Before Sharfuddin and Core JJ.*

DILAN SINGH

v.

1912  
 Aug. 26.

EMPEROR.\*

*Jurisdiction of Criminal Court—Complaint—Irregularity—Criminal Procedure Code (Act V of 1898) ss. 195, 476, 532, 537—Order for prosecution—Penal Code (Act XLV of 1860) s. 211—False charge laid before the police—Police report—Judicial inquiry—Commitment to the Court of Sessions.*

A conviction by the Court of Sessions cannot be set aside simply on the ground of a defect in the initiation of the proceedings in the Commitment Court or on the ground of some irregularity in the commitment proceedings more especially when that point was not raised in the lower Court. S. 532 of the Criminal Procedure Code would cure such a defect.

*Haibat Khan v. Emperor* (1) distinguished.

\* Criminal Appeal No. 576 of 1912 against the order of C. E. Pittar, Sessions Judge of Gaya, dated July 9, 1912.

(1) (1905) I. L. R. 33 Calc. 30.

*Abdul Rahman v. Emperor* (1) and *Queen-Empress v. A. Morton and Moortza Ali* (2) referred to.

Recommendation for prosecution by a police-officer under s. 211 of the Penal Code comes within the meaning of the word "complaint" as used in s. 195 of the Criminal Procedure Code, as that section clearly contemplates prosecution at the instance of police-officers.

1912  
DILAN  
SINGH  
v.  
EMPEROR

THE facts shortly are these. On the 21st of January 1912, the petitioner laid an information before Sub-Inspector Rajendra Pershad in charge of Fatehpore police station in the district of Gaya, charging one Fazal Hussain and others with coming into his *kutchery*, catching hold of him, beating him, shutting him up in a room and then setting fire to the thatch of the *kutchery* building. The police enquired into the case, found it false and asked for the prosecution of the petitioner and one Karu Singh under sections 182 and 211 of the Indian Penal Code for bringing a false case.

The police report was duly placed before Mr. N. N. Gupta, Deputy Magistrate in charge. He examined one Begraj Mahiton and one Samiri Kaharni and on the 6th of March made the following order:—

"Prosecute the complainant under s. 211 of the I. P. C. and draw up a proceeding."

In pursuance of the order aforesaid, a proceeding purporting to be under s. 476 of the Criminal Procedure Code, was drawn up directing the prosecution of the petitioner under s. 211 of the Penal Code for falsely charging Fazal and others "before Sub-Inspector Rajendra Pershad of police station Fatehpore with having committed mischief by setting fire to a dwelling place and dacoity of property valued at Re. 1-12, under ss. 436 and 395 of the Penal Code, knowing that there was no just or lawful ground for such charge against him."

(1) (1907) 7 C. L. J. 371.

(2) (1884) I. L. R. 9 Bom. 288.

1912  
DILAN  
SINGH  
v.  
EMPEROR.

This was followed by a preliminary inquiry which terminated, on the 30th of May 1912, in the commitment of the petitioner to the Court of Sessions to take his trial under s. 211 of the Penal Code.

On the 9th of July 1912, the petitioner was convicted and sentenced to three years' rigorous imprisonment by the Sessions Judge of Gaya.

Against this order the petitioner appealed to the High Court.

*Mr. P. L. Roy* and *Babu Sivanandan Roy*, for the appellants.

*The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown.

SHARFUDDIN AND COXE JJ. The appellant in this case has been convicted under section 211 of the Indian Penal Code of instituting false criminal proceedings before the Sub-Inspector of Fatehpore police station against one Fazal Hussain and others.

It appears that there was some dispute about the possession of the village Manhona and the zamindari kutchery therein, between Karu Singh, who is one of the ticcadars of the village, and Amiral Hossain, who is a lessee from Kali Singh, another ticcadar. The accused, Dilan Singh, admittedly went to the thana and there lodged information before the Sub-Inspector, Rajendra Narain Varma, that while he was sitting in the kutchery Fazal Meah and others came there, caught hold of him, beat him, shut him up in a room in the kutchery and then set fire to the thatch of the kutchery building: that he raised an alarm and the villagers came and rescued him. The Sub-Inspector, on enquiry, did not believe this story. The words of his final report are "I therefore submit the final report in the case and recommend that Dilan



Singh and Karu Singh may be prosecuted under sections 182 and 211."

The prosecution of the accused was then directed by a Deputy Magistrate. A preliminary inquiry was made and the accused was committed to the Court of Sessions. The learned Sessions Judge agreeing with both the Assessors has convicted the accused under section 211 and has sentenced him to three years' rigorous imprisonment.

The learned counsel, who appears on behalf of the appellant, argues in the first place that the conviction is bad inasmuch as the first Deputy Magistrate had no jurisdiction to direct the prosecution of the accused under section 476 of the Criminal Procedure Code, and reliance has been placed on the case of *Haibat Khan v. Emperor* (1) and that of *Abdul Rahman v. Emperor* (2). The case of *Haibat Khan* (1) seems to us to be quite distinguishable, because in that case there had been no commitment nor was the accused convicted at the Sessions Court. It seems to us clear that this makes a very considerable difference. Even if there is any defect in the initiation of the proceedings in the Original Court, still when the accused has been committed for trial to the Court of Sessions, a conviction by the Court of Sessions cannot, in our opinion, be set aside simply on the ground of some irregularity in the commitment proceedings more especially when that point was not raised in the first Court. In circumstances which are not wholly dissimilar, the Bombay High Court held that section 532 would cure such a defect: see the case of *Queen-Empress v. A. Morton and Moorteza Ali* (3). In the case of *Abdul Rahman* (2), though the learned Judges purported to follow the case of *Haibat Khan* (1), they

1912

DILAN  
SINGH  
v.  
EMPEROR.

(1) (1905) I. L. R. 33 Calc. 30. (2) (1907) 7 C. L. J. 371.

(3) (1884) I. L. R. 9 Bom. 288.

1912  
DILAN  
SINGH  
v.  
EMPEROR.

went very considerably beyond the decision in the former case. That case, however, is distinguishable from the present case because of the circumstance that the police officer in this case has recommended the prosecution under section 211. It has been argued that that recommendation cannot be regarded as a complaint because the complainant was not examined on oath. Certainly it is not a complaint as defined in the Code inasmuch as that definition expressly excludes a report of a police officer. But it appears to us to come within the meaning of the word "complaint" as used in section 195, as that section clearly contemplates prosecutions at the instance of police officers. In any case when a police officer asks that a person should be prosecuted under section 211 for information given to him, and gives evidence himself in support of that charge we cannot see that any serious irregularity can arise in the conviction of the accused in proceedings initiated upon that report. The order of the first Deputy Magistrate purporting to be one under section 476 might in that case be regarded as surplusage. We do not, therefore, think that effect can be given to the point of law raised by the learned counsel. We are not prepared to say that there has been any real irregularity inasmuch as the accused has been prosecuted at the request of a person who was entitled to ask for a prosecution. But if there has been any irregularity it certainly, in our opinion, is such a one as is cured by section 532 or 537 of the Criminal Procedure Code. On the facts the evidence is altogether one-sided. It is common ground that the kutchery building was set on fire by one side or the other. The whole of the evidence is that it was not set on fire by Fazal Meah and indeed Fazal Meah had no apparent motive beyond the ties of friendship to burn the kutchery and to attempt to burn Dilan Singh. There

are small defects apparently in the story of the prosecution, as there are in all such stories, but the learned Judge has dealt with them in his judgment and his discussion of them and the conclusions that he has arrived at with respect to them appear to us to be reasonable. We, therefore, think that the conviction is right. The sentence is not excessive.

The appeal is accordingly dismissed.

S. K. B.

*Appeal dismissed.*

1912  
DILAN  
SINGH  
v.  
EMPEROR.

## APPELLATE CIVIL.

*Before Mookerjee and Beachcroft JJ.*

HARIHAR GURU

v.

ANANDA MAHANTY.\*

1912  
Aug. 30.

*Refund of Court-fee—Appeal, over-valuation of—Partial decree—Memorandum of appeal, over-valuation of—Court-fee paid in excess by inadvertence—Practice.*

The appellant's agent having, by inadvertence, over-paid court-fee on the memorandum of appeal, the High Court directed the Taxing officer to issue the necessary certificate to enable the appellant to obtain a refund of the excess court-fee from the Revenue authorities.

*In the matter of Grant (1) referred to.*

THE appellant, in this appeal, having paid an excess court-fee on the memorandum of appeal, applied to the Court for a refund of the amount paid in excess in the following terms:—

“That your petitioner filed on the 24th of June 1912 the above appeal before this Honourable Court against a partial decree amounting to

\* Application in Appeal from Original Decree, No. 198 of 1912.

(1) (1870) 14 W. R. 47.

1912

HARIHAR  
GURU  
v.  
ANANDA  
MAHANTY.

Rs. 17,961 passed against your petitioner, who was the defendant, by the learned Subordinate Judge of Cuttack.

"That your petitioner's agent has, on the mistaken idea that an amount of court-fee stamp equal to that paid by the plaintiff on his plaint has to be paid on the memorandum of appeal, although the relief sought in the appeal was Rs. 17,961 only, without consulting your petitioner's vakil, paid Rs. 950 as court-fee stamp instead of Rs. 715 the *ad valorem* fee on the relief claimed.

"Your petitioner, therefore, prays that upon the circumstances stated above your Lordships will be pleased to order the Collector or the Secretary to the Board of Revenue to refund Rs. 235 to your petitioner, or to pass such other order as to your Lordships may seem fit and proper."

*Babu Surendra Madhab Mullick*, for the petitioner.

MOOKERJEE AND BEACHCROFT JJ. The valuation of this appeal will be considered as Rs. 17,961; the sum of Rs. 235 has, therefore, been overpaid as court-fees; let the Taxing officer issue the necessary certificate to enable the appellant to apply to the Revenue authorities to obtain a refund of the excess court-fee. We make this order on the authority of the case of *In the matter of Grant* (1)\*

(1) (1870) 14 W. R. 47.

\* [In accordance with the above order, the Deputy Registrar of the High Court, for the Taxing officer, issued the following certificate to the Board of Revenue, Bengal, on the 27th September 1912 :—

"It appears that the memorandum of the above appeal was filed in this Court by the vakil for the abovenamed appellants on two court-fee stamp papers denoting rupees nine hundred and fifty in all, *i.e.*, one paper of the value of rupees nine hundred and the other of the value of rupees fifty.

The value of the appeal, however, is rupees seventeen thousand nine hundred and sixty-one, and the *ad valorem* court-fee payable on the memorandum of appeal is, therefore, rupees seven hundred and fifteen only. The excess court-fee of rupees two hundred and thirty-five was paid by inadvertence.

The said court-fee stamp papers of rupees nine-hundred and fifty have been punched and cancelled, and they cannot be produced with this certificate, inasmuch as they continue affixed on the said memorandum of appeal which is filed of record in this Court.

On application being made by the appellants, this Court, on the 30th August 1912, ordered that the Taxing officer of this Court on its appellate side be at liberty to grant a certificate to the said vakil to enable him to apply to the Revenue authorities to obtain a refund of the said excess court-fee of rupees two-hundred and thirty-five on behalf of his clients, the appellants.

Under the above circumstances, the said appellants, through their said vakil, claim to obtain, and ought to obtain, a refund of the value of the said excess court-fee of Rs. 235 (two hundred and thirty-five only)."

Thereupon, on the 29th January 1913, the Board of Revenue passed the following resolution :—

"Under Note 3 to Rule 35, pages 49-50 of the Stamp Manual, 1911, the Board sanctions the refund of Rs. 235 (rupees two hundred and thirty-five only) less the deduction of one anna in the rupee.

E. W. COLLIN,

*Member of the Board of Revenue, Bengal."*]

1912

HARIHAR  
GURU  
v.

ANANDA  
MAHANTY.

## APPELLATE CRIMINAL.

*Before Chitty and Richardson JJ.*

SAMARUDDI

v.

EMPEROR.\*

1912

Oct. 4.

*Jury, trial by—Charge to the jury—Misdirection—Suggestion by the Judge of an alternative aspect of the case not put forward by the prosecution or defence—Omission to point out to the jury, specifically, the evidence against each accused, and minute details—Criminal Procedure Code (Act V of 1898), ss. 297, 303—Rioting—"Violence," meaning of—Penal Code (Act XLV of 1860), ss. 146, 147—Admissibility of evidence of a proceeding to keep the peace as part of the res gestæ.*

Where the common object alleged in the charge as framed was to take forcible possession of the complainant's land and hut and to assault him and others named, and the prosecution and defence each asserted exclusive possession and an attack by the opposite party :

\* Criminal Appeal, No. 656 of 1912, against the order of G. B. Mumford, Additional Sessions Judge of Dacca, dated June 4, 1912.

1912  
 SAMARUDDI  
 v.  
 EMPEROR.

*Held*, that the Judge was not wrong in asking the jury to consider, as a third alternative, an intermediate state of facts, viz., that the complainant's party went to turn the accused party out of possession, was resisted and driven back, and that the latter then followed after and assaulted the former.

*Banga Hadua v. King-Emperor* (1), *Queen v. Sabid Ali* (2) and *Wafadar Khan v. Queen-Empress* (3) distinguished.

The word "violence" in s. 146 of the Penal Code is not restricted to force used against persons only, but extends also to force against inanimate objects.

The omission to point out to the jury, specifically, the exact evidence against each accused, is not a misdirection when the Judge has discussed the whole of it and has told them to be satisfied as to the guilt of, and to return an independent verdict against, each accused.

THE appellant, Samaruddi, was tried with four others by the Additional Sessions Judge of Dacca, with a jury, on charges under sections 147, 304 and 149 of the Penal Code, and convicted and sentenced thereunder, on the 4th June 1912, to two years' rigorous imprisonment under each section concurrently.

The facts were as follows. There was a long standing dispute between Pandab Das and one Madhu Mala regarding the possession of certain land and a hut standing thereon, each claiming possession of the same under Purna Babu of Murapara and the Kusumhati Majumdars, respectively. In November 1910 Madhu Mala brought a test case to oust Pandab from the land and hut, and lost it. The Kusumhati landlords then made various attempts, it was alleged, to disturb some of the tenants who had attorned to the rival proprietor. The prosecution case was that, on the 8th January 1912, Pandab was employed in his field, the disputed land, in uprooting mustard plants, with his brothers Joydeb and Chandra Kishore

(1) (1909) 11 C. L. J. 270.

(2) (1873) 20 W. R. Cr. 5.

(3) (1894) I. L. R. 21 Calc. 955.

and a labourer named Karam Ali, that Samaruddi, followed at a short distance behind by 30 or 35 sardars, sallied from Madhu Mala's house, that Samaruddi first entered the field and told Pandab to desist from taking the crop, and that on the latter's refusal, he gave his men an order to beat the complainant's party. The complainant and his brothers, it was said, ran away to the house of one Bharat, but Karam Ali was overtaken by seven or eight of the sardars, including two of the accused on trial, and wounded on the head by Daiya Sardar. Karam then stood near Bharat's cowshed and challenged his assailants, whereupon Wajuddi drove his spear into Karam's chest and killed him, while the other sardars stood a little apart and pelted Bharat's house with clods of earth. The defence was that Madhu was in possession, and that the complainant's party went upon the land and was driven out by 12 sardars stationed there to protect her possession.

During the trial Sanu [P. W. 5] deposed that the naib of the Kusumbhati Majumdars wanted rent from him, which he refused, as he claimed to hold under Purna Babu, that thereupon he, the witness, was carried to the former's *cutcherry* and forced to promise payment of the same, and that on default he was threatened by some of the accused against whom he was thus compelled to institute proceedings under section 107 of the Criminal Procedure Code, in consequence of which they were bound down, while a similar proceeding brought by them against him shortly before his own case was dismissed.

The charges, as amended by the Judge, stood as follows, the alterations being indicated in italics :—

(1) That you . . . were members of an unlawful assembly, and in prosecution of the common object of such assembly, viz. in order to take forcible possession of the complainant Pandab's land and hut, *and to assault*

1912  
SAMARUDDI  
v.  
EMPEROR.

1912  
 SAMARUDDI  
 v.  
 EMPEROR.

*Pandab, Joydeb, Chandra Kishore and Karam Ali*, you thereby committed rioting under s. 147, I. P. C.

(2) That you . . . were members of the aforesaid unlawful assembly in prosecution of the common object of which, *as stated above*, one of its members, Wajuddi, killed Karam Ali by stabbing him with a spear, *which act you knew to be likely to be committed in prosecution of the above common object*, and that you are guilty under ss. 304 and 149, I. P. C.

The material portions of the charge of the Judge to the jury were as follows:—

*Charge read to the Jury.*—

Sections 141, 146, 149 and 304 read and explained to jury. Prosecution story recalled to jury.

Pandab, complainant, and one Madhu Mala have been quarrelling over the land in question for some years. In February 1911 Pandab won a case brought against him by Mudhu Mala under sections 143 and 447, I. P. C. for building a hut on the land. Pandab's case is that he has been in possession for many years, and that after building the hut he lived in it.

The Kusumhati Majumdars are said to be trying to assert proprietary rights in the land. They are landlords of Madhu Mala, whose *bari* is close by. Pandab is raiyat of one Purna Babu of Murapara. One morning Pandab and his brothers were uprooting mustard in the land just north of the hut when a crowd of Kusumhati sardars (*lathials*) came up armed with spears, *daws* and *lathis*. One of this crowd, Samaruddi, accused, is said to have told Pandab that Rebati Babu (one of the Kusumhati Majumdars) had forbidden him to uproot mustard. The other accused also are said to have been members of this crowd. Pandab remonstrated, whereupon Samaruddi said, "seize and beat the *sala*" or words to that effect. Pandab and his brothers ran away, as did their labourer Karam Ali.

The latter was pursued by Wajuddi and others of the *lathials*. When he got as far as the south cowshed of one Bharat Das, he pulled up a bamboo and challenged his pursuers. He appears to have been already struck on the head by one Daiya. Wajuddi then struck him on the chest with the spear and he fell down and died shortly afterwards. Meanwhile the other *lathials* were throwing clods at Bharat's *bari* where Pandab had taken refuge. After Karam Ali fell down, the *lathials* went off south through Madhu Mala's *bari*.

The defence story is that Purna Babu is trying to assert proprietary rights in the land, that Madhu Mala has been in possession for years, that after the case about the hut she was so oppressed by Purna Babu's men that she went to his manager and executed a *kabuliat* in his favour and a



bond in favour of his wife, and that she was since then in peaceful possession of the land until shortly before the present occurrence when the settlement operations began in the neighbourhood. Madhu Mala then told the settlement people that the Kusumhati Majumdars were her real landlords, and not Purna Babu. This enraged the latter's party and they determined to retake possession. To protect Madhu Mala's right, 12 *bideshi* (foreign) sardars were stationed on the land.

Complainant's party came to take possession, and were opposed and worsted by the sardars. In the course of the fight that ensued Karam Ali was struck with a spear. It is claimed that the sardars are protected by Madhu Mala's right of self-defence of property, and that none of the present accused were present at the time. You have to consider which of these two stories is the more probable . . . . .

I would ask you to bear in mind a third alternative, however, and that is that Madhu Mala was in possession, that complainant's party came to turn her out, that they were worsted and driven out of the land by the Kusumhati sardars, that so far these sardars had been acting within their rights, that after complainant's party had been put to flight the sardars intoxicated with success or anger or both determined to teach the complainant's party a lesson, that they, therefore, went after them, that from this moment they became members of an unlawful assembly with the common object of assaulting complainant's party, and that violence was used and Karam Ali was assaulted in prosecution of that common object. To come to a finding on the charge as it stands, you will have to find—(i) who was in possession of the disputed land ; (ii) if the complainant was in possession, whether there was any assembly of five or more persons, each of whom intended that complainant should be forcibly turned out ; (iii) whether any or all of the accused were members of that assembly . . . . . ; (iv) whether force or violence was used in pursuance of the common object shared by accused, presuming that they did share it . . . . . ; (v) whether the force used amounted to an offence . . . . . There must be some force or violence in pursuance of the common object to make a riot . . . . . Violence may be regarded as force towards inanimate objects. Jury to consider if throwing of clods at Bharat's *bari*, if believed, would amount to violence.

Jury must also consider whether the accused, if they believe they were originally members of an unlawful assembly, were still members thereof when the clods, if any, were thrown, and again when Karam Ali was assaulted, and whether the violence and force alleged to have been used were in pursuance of the common object which they are said to have showed with the other members . . . . .

1912

SAMARUDDI  
r.  
EMPEROR.

1912

SAMARUDDI  
v.  
EMPEROR.

The charge concluded in these terms :—

“Jury to decide on the facts before them, if any or all of the accused have committed any offence included in the charge. They must come to an independent decision.”

The jury convicted Samaruddi unanimously on both heads of charge, but acquitted the other accused. The Judge, agreeing with the verdict, sentenced the former as stated above. Samaruddi appealed to the High Court.

*Babu Dasarathi Sanyal and Babu Debendra Narain Bhattacharjee*, for the appellant.

*The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown.

CHITTY AND RICHARDSON JJ. In this case the appellant Samaruddi has been convicted by the unanimous verdict of a jury of offences under sections <sup>304</sup>/<sub>145</sub> of the Indian Penal Code and section 147 of the Indian Penal Code, and has been sentenced by the Additional Sessions Judge of Dacca to two years' rigorous imprisonment on each count, the sentences to run concurrently. The appeal is, therefore, open to him only on the questions of law relating to the charge of the Additional Sessions Judge.

The first point that has been urged before us is that the Judge was in error in putting before the jury what he calls “a third alternative.” It should be stated that, before the trial began in the Sessions Court, the charge was amended, and, as eventually framed, the common object alleged was “in order to take forcible possession of complainant Pandab's land and hut and to assault Pandab, Joydeb, Chandra Kishore and Karam Ali.” The Judge suggested to the jury that the case might not be precisely as the prosecution alleged, and at the same time might not be what the defence endeavoured to set up, but something

1912  
 ———  
 SAMARUDDI  
 v.  
 EMPEROR.

between the two, namely, that the complainant's party might have gone to turn Madhu Mala out of possession, that they were resisted and driven out of the land by the Kusumhati sardars, that up to that point the Kusumhati sardars might have been acting within their rights, but that they went further and intoxicated with success or anger or both determined to teach the complainant's party a lesson and assaulted them. Reliance was placed on the case of *Banga Hadua v. King-Emperor*(1) and also on the cases of *Queen v. Sabid Ali*(2) and *Wafadar Khan v. Queen-Empress*(3). But these cases are quite distinguishable on their facts. We can see no reason why the Judge should not have made this suggestion to the jury. He left it entirely open to them as to whether they would accept it or not, and we cannot agree in the contention of the learned pleader for the appellant that, if it was accepted, it would entirely destroy the prosecution case. The Full Bench case of *Queen v. Sabid Ali*(2) cited above was quite different from the present, as was also the case of *Wafadar Khan v. Queen-Empress*(3). There the charge was altered at the end of the case for the prosecution, and a totally different common object was alleged. Here there has been one common object alleged throughout, and it cannot be suggested that the accused did not know exactly what they had to meet.

In the second place, it is argued that the learned Judge's explanation of section 147 of the Indian Penal Code is faulty, and that "violence" cannot mean violence against inanimate objects. No authority has been cited for such a proposition, and we see no reason for restricting the meaning of the word

(1) (1909) 11 C. L. J. 270.

(2) (1873) 20 W. R. Cr. 5.

(3) (1894) I. L. R. 21 Calc. 955.

1912  
SAMARUDDI  
v.  
EMPEROR.

“violence” in the manner stated. It could hardly he said that, if an unlawful assembly came together for the purpose, say, of pulling down a man’s house, and they proceeded to carry out the object, they could not be said to have used “violence.”

Then it was urged that, as regards the appellant Samaruddi, the Judge did not point out to the jury exactly what the evidence against him was. We do not see that there is any force in this contention. The Judge has discussed the whole of the evidence to the jury, and this man’s name is mentioned on more than one occasion. He has told the jury that they must be satisfied as against each of the accused, (there were four others tried along with Samaruddi who were found not guilty), and that their verdict must be independent as against each.

The next argument that the Judge should have asked the jury, when they returned their verdict, as to which common object they had found proved, has no force in this particular case, because only one common object was alleged. In the case of *Wafadar Khan v. Queen-Empress*(1) cited above there were two distinct common objects which had been alleged and had been mentioned in the charges. It is said that, in his charge in this case, the Judge has failed to give advice to the jury on most important particulars; but the particulars to which the learned pleader has referred are minor details in the evidence which the jury had heard and which they were asked to take into consideration. It was not, in our opinion, necessary for the Judge to go into the minutest details; but even if it were, there is nothing to show in this case that these particular minor points were not mentioned to the jury inasmuch as we have only the heads of the charge before us.

(1) (1894) I. L. R. 21 Calc. 955.

Then it was argued that the Court witness Hussain Buksh's evidence should have been explained by the Judge. It is difficult to say what precisely is meant by this. The evidence was commented upon by the Judge, and the jury were left to form their own opinion of it.

Lastly, it was argued that evidence which was inadmissible was admitted, and that that prejudiced the accused. This evidence consisted of a statement of the prosecution witness, No. 5 Sanu, who stated that he had brought a case under section 107 of the Criminal Procedure Code against some of the accused, including the appellant, and that they had been bound down, while a cross-case under the same section brought against himself by the accused had been dismissed. This was not, so far as we can see, introduced; as suggested here, for the purpose of proving the bad character of the accused, but as part of the *res gestæ*, the events which had transpired before and which eventually led up to the riot which was investigated in the present case.

We think on the whole that the charge of the learned Sessions Judge was both full and impartial, and that the whole case was fairly put before the jury by him. We accordingly dismiss the appeal.

E. H. M.

*Appeal dismissed.*

1912

SAMARUDDI  
v.  
EMPEROR.

**CRIMINAL REVISION.***Before Sharfuddin and Coxe JJ.*

1912

Nov. 28.

FIDOI HOSSEIN

v.

EMPEROR.\*

*Practice—Appellate Court, duty of—Defective judgment—Omission to consider the defence evidence in a bad livelihood case—Criminal Procedure Code (Act V of 1898), ss. 110, 118, 367 and 424.*

It is the duty of the Appellate Court, on an appeal from an order under ss. 110 and 118 of the Criminal Procedure Code, to look into the evidence for the defence, and after dealing with it to come to a decision thereon, notwithstanding that the counsel for the appellant has practically ignored it during his arguments.

UPON the receipt of a police report from the Sub-Inspector of Islampur thana, the Subdivisional Officer of Kissengunge drew up a proceeding under s. 110 of the Criminal Procedure Code against the petitioner. The case was enquired into by Babu N. K. Tripathi, a Deputy Magistrate at Kissengunge, when 30 witnesses were examined for the prosecution and 95 for the defence. By his order, dated the 29th July 1912, the Magistrate found that the petitioner habitually committed mischief by fire, and was by habit a harbourer of thieves, and so desperate and dangerous a character as to render his being at large without security hazardous to the community, and directed him to execute a bond in the sum of Rs. 2,000, with two sureties in half the amount each, to be of good behaviour for one year. The petitioner appealed

\* Criminal Revision No. 1440 of 1912, against the order of R. G. Kilby, District Magistrate of Purnea, dated Sept. 16, 1912.

against the order to the District Magistrate of Purnea, who affirmed the same, but reduced the amounts of the bond and security. In his judgment the Magistrate dealt with the evidence of each of the thirty prosecution witnesses in detail, but did not refer to the evidence for the defence at all. After considering the prosecution evidence, he merely discussed certain arguments of fact and law put forward by the petitioner's counsel, and dismissed the appeal with the modification stated above. The petitioner then moved the High Court and obtained a Rule to show cause why the order of the Appellate Court should not be set aside, and the appeal re-heard on the ground that the District Magistrate had omitted to take into consideration the evidence for the defence. In his explanation the Magistrate stated that the reason why his judgment contained no reference to the defence evidence was, that, when the case was argued before him, it was practically ignored by the counsel for the appellant.

*Mr. Gregory* and *Maulvi Nooroodeen Ahmed*, for the petitioner.

No one appeared for the Crown.

SHARFUDDIN AND COXE JJ. This is a Rule calling upon the District Magistrate to show cause why the order of the Appellate Court, under section 110 of the Criminal Procedure Code, should not be set aside and the appeal re-heard, on the ground that the District Magistrate had omitted to take into consideration the evidence for the defence.

We have received the explanation sent to us by the learned District Magistrate, wherein he has admitted that in the appeal before him he did not think it necessary to deal with the evidence adduced by the defence in the case. But he says this was

1912  
FIDOI  
HOSSEIN  
v.  
EMPEROR.

1912  
 FIDOI  
 HOSSEIN  
 v.  
 EMPEROR.

because no reference to that evidence was made by the counsel who appeared for the appellant before him, and the evidence on the part of the defence was practically ignored in the argument. There is no doubt, however, that it was the duty of the Appellate Court to look into that evidence, and after dealing with it to come to a decision. For that reason we think it necessary that the case should go back for re-hearing. The appeal will be re-heard by the District Magistrate, and at the re-hearing of the appeal he should deal with the evidence on both sides.

E. H. M.

*Case remanded.*

---

### PRIVY COUNCIL.

---

P.C.<sup>o</sup>  
 1912  
 Nov. 12, 26.

AZIMA BIBI  
 v.  
 SHAMALANAND.

#### [ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

*Mortgage—Mortgage bond executed by male members of Mahomedan family—No proof of custom to exclude females as in Hindu family—Female members added as defendants in mortgage suit, though not executants of bond—Form of decree—Whether females were represented in the mortgage transaction by male members of family—Esoppel by conduct.*

The appellants were the female members of a Mahomedan family which had adopted the Hindu religion in matters of worship, and as to which both Courts in India concurrently held that there was no custom proved excluding female members from inheritance, which was the case set up by the respondent. In a suit brought by the latter to enforce a mortgage bond which had been executed only by the male members of the

<sup>o</sup> *Present*: LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.



family, in which suit the appellants were also joined as defendants, the first Court made a decree against the interests of the male defendants only in the property ; but the High Court decreed the suit against both the male and female defendants on the ground that, because the female members had not actively interfered in the management of the property, the male defendants must be taken to have represented them in the mortgage transaction. It appeared that in other transactions the male members of the family had dealt with the family property without the active concurrence of the females.

*Held* by the Judicial Committee (reversing the decision of the High Court), that the evidence did not prove that the male defendants had "represented" the appellants. The latter were *pardanashin* ladies, and naturally left the management of the property to their male relatives. There was nothing to show that the appellants had misled the respondent either by word or conduct to the belief that they had no proprietary interest in the property ; and he made no inquiries in the matter from them or their husbands as he might have done if he had any doubt in the matter. The decree of the High Court was therefore erroneous so far as it made the appellants liable, and should have been limited to making liable only the interests in the property of the male defendants, the executants of the mortgage bond.

APPEAL from a judgment and decree (6th April 1906) of the High Court at Calcutta, which varied a decree (11th January 1904) of the District Judge of Arrah.

Some of the defendants were the appellants to His Majesty in Council.

The suit out of which this appeal arose was one to enforce a mortgage bond, dated 13th September 1895, executed in favour of the respondent by the first, second, third and fourth defendants. The first three defendants were the sons of one Umed Ali Khan, and the fourth was his grandson. The other defendants included defendants 5 to 16 who were wives or other female relations of the first four defendants or descendants of such relations ; and though they were not executants of the bond, they were included in the suit, because in 1898 and the following years, and subsequent to the execution of the bond in suit, their

1912

AZIMA BIBI  
v.  
SHAMALA-  
NAND.

1912  
AZIMA BIBI  
v.  
SHAMALA-  
NAND.

names were registered in the Collectorate as part proprietors of the lands covered by the bond.

This plaintiff's case, shortly, was that the family of the defendants, though Mahomedans, still followed the Hindu law of inheritance, and that female members were excluded from inheritance when there were sons in existence; that consequently after the death of the common ancestor the whole property passed to Umed Ali Khan, and after his death to the first three defendants and the father of the fourth defendant, and ultimately to the first four defendants; and that the mortgage bond was therefore executed by the full owners, and bound the whole property.

The execution of the bond was admitted.

The only defence now material was that of the female defendants, the present appellants, who pleaded that they were governed by the Mahomedan law of inheritance, and that their shares in the family property could not be affected by the mortgage bond executed only by the first four defendants.

Of the issues raised, the 3rd, 7th and 8th were alone material on this appeal: (3rd) "is the bond, if duly executed by defendants 1 to 4 binding on defendants 5 and 7 to 16? (7th) was there a custom among the defendants according to which property descended according to Hindu law? and (8th) are the defendants 5 and 7 to 16 estopped by their conduct?" On these issues, the District Judge held as to the 7th issue that the facts proved—

"were not strong enough evidence to justify a finding that there is a custom in the family depriving these Mahomedan females of the rights which the law of their faith expressly gives them. The fact of the management by the males is of little value. Such a state of things might easily exist in the most strictly orthodox Musalman family, if the members were on good terms with each other, a contingency which surely cannot be regarded as wholly impossible . . . Accordingly I find this issue against the plaintiff."

As to the 8th issue the District Judge said :—

1912

AZIMA BIBI

v.

SHAMALA-  
NAND.

"I think the females cannot possibly be held to be estopped by conduct from questioning the mortgage. In the present case, if it is admitted that the females did allow the males to hold themselves out as owners of the whole estate, an admission that could hardly be made without qualification yet that conduct of theirs ought certainly not to have influenced the plaintiff. It is not pleaded that he was unaware of the existence of the females, and being a pleader he knew well that under ordinary Mahomedan law they were entitled to share in the property. His plea is that he thought from their conduct that they still retained the Hindu law. But he must have known that this was an extremely unusual circumstance, and he assuredly ought to have satisfied himself that it really existed. He admits that he never questioned any of the ladies themselves; and if that was impracticable in the case of *pardahnashin* ladies, it was at any rate possible to consult their husbands and sons. The plaintiff, if he had acted with prudence, would have had his bond attested by some such representative of the ladies, and, in any case, ought to have made inquiries from them as to whether the unusual custom said to prevail in the family really existed. He did none of these things and cannot now plead that he had no notice of the right of the ladies in the property mortgaged to him. I find this issue against the plaintiff."

On the 3rd issue, the District Judge found as follows :—

"The decision of this issue follows on the decision of the last two issues. If the plaintiff has not proved the custom alleged by him and the females cannot be held to be estopped, the bond executed by the males cannot be held to be binding on them unless they were benefited under it. But the main consideration of the bond was the payment of the debt due in like manner on bonds executed by males alone, and there is no proof that those bonds were executed for the benefit of the females. This issue also must be found against the plaintiff."

The District Judge gave the plaintiff a decree on the mortgage bond, but only against the interests in the mortgaged property of the defendants 1 to 4; and he ordered the plaintiff to pay the costs of the female defendants.

An appeal by the plaintiff was heard by a Divisional Bench of the High Court (BRETT and HOLMWOOD JJ.) who in the 7th issue concurred with the finding

1912  
 AZIMA BIBI  
 v.  
 SHAMALA-  
 NAND.

of the District Judge that the evidence adduced by the plaintiff was not sufficient to establish the existence of a custom in the family which would deprive the female defendants of their rights under the Mahomadan law of inheritance.

As to the other two issues (3rd and 8th), the judgment of the High Court proceeded as follows :—

“ The plaintiff's case was, however, in addition that, even if the female defendants had any interest in the properties covered by the bond, they had never asserted their rights but had allowed the defendants Nos. 1 to 4 for a long series of years to manage and deal with the property as if they were the actual sole proprietors, and so by their conduct had laid the plaintiff and others to believe that the defendants Nos. 1 to 4 were the sole proprietors of the property and to deal with it as such. Further, that in allowing the defendants Nos. 1 to 4 all along to deal with the property, they had constituted them their representatives in all transactions into which those persons had entered in connection with the property, and that in the mortgage loan which was taken for the benefit and protection of the whole of the property they must be held to have been represented by the defendants Nos. 1 to 4.

‘ The learned pleader for the defence has urged that this case was not distinctly raised in the issues, but we think it was raised by issues Nos. 8 and 3. . . . And we think that in dealing with these issues the District Judge has been unduly influenced by his finding on the previous issue as to existence of the alleged custom in the family. Even though there may be no custom, the female defendants may still be estopped by their conduct from denying the plaintiff's claim. The two questions are entirely separate, as also the third, whether in the execution of the mortgage deed the female defendants were represented by the defendants Nos. 1 to 4.’

After discussing the evidence as to the transactions in respect of the property, the judgment continued :—

“ In our opinion then the female defendants, whether they had any interest in the ancestral property or not, acted in such a way as to lead the plaintiff in common with others to believe that they had relinquished it, and the defendants Nos. 1 to 4 were the sole actual proprietors of the property, and we think that the plaintiff acted under the influence of that belief when he took the mortgage bond from the defendants Nos. 1 to 4. We are inclined to think, therefore, that in this case the conduct of the female defendants was such as to mislead the plaintiff, supposing it to be a fact that after marriage each of them retained any share in the family property.

" But in our opinion, for the purposes of this appeal, it is not necessary to go beyond the point which we consider was raised in the 3rd issue, *viz.*, were the female defendants in the mortgage transaction with the plaintiff represented by the defendants Nos. 1 to 4. In our opinion that question must be answered in the affirmative. Accepting for the purpose of argument the supposition that the female defendants retained any share in the family property after their marriages, we find that for a long series of years all transactions and litigations in connection with the family property were carried on by or in the names of the defendant No. 1 as manager of the family of defendants Nos. 1 to 4, and that the female defendants either personally or through their husbands never inter-meddled in any way with the property. No mention is made in any document or proceeding of the interests of the female defendants till 1898 when their names were registered in the Collectorate. If then the properties were acquired from joint family funds, and if the female members of the family had any interest in the properties, undoubtedly, in all the transactions connected with them, they were represented by the defendants Nos. 1 to 4. The mortgage bond on which the suit was brought, was executed by defendants Nos. 1 to 4 in respect of a loan taken by them for the benefit of the whole family and to save the property from being sold in satisfaction of the two decrees which had been obtained and in execution of which the properties were advertised for sale. In our opinion, the female defendants, if they had any interest in the property, were represented in the mortgage transaction by the defendants Nos. 1 to 4 and are bound by the mortgage bond. The circumstances under which the female defendants were registered in respect of shares of the family properties after the execution of the mortgage bond leave in our minds no doubt that the registration was applied for at the instance of and through the defendants Nos. 1 to 4 with the object of fraudulently depriving the plaintiff of a portion of his security.

" Disagreeing, therefore, with the District Judge, we find the 3rd issue in favour of the plaintiff, and hold that the interests of the female defendants in the property (if any) were bound by the mortgage entered into by the defendants Nos. 1 to 4."

The appeal was consequently allowed and a decree was made against the male as well as the female defendants. From that decision the female defendants appealed to His Majesty in Council.

On this appeal, which was heard *ex parte*,  
 Ross, K.C., and G. Considine O'Gorman, for the  
 appellants, contended that the High Court had erred

1912

AZIMA BIBI  
 v.  
 SHAMALA-  
 NAND.

1912  
AZIMA BIBI  
v.  
SHAMALA-  
NAND.

in giving the respondent a decree with reference to a case not raised in the pleadings. It was not suggested in the pleadings or in the first Court that the appellants had in all transactions with the property been represented by the defendants 1 to 4; and there was nothing in the evidence to show that those defendants had represented the appellants in the mortgage transaction in the suit. Nor, it was submitted, were the appellants estopped by their conduct from questioning the mortgage. The judgment of the High Court was based upon an erroneous view of the effect of the evidence in the case. The Courts below had concurrently held that there was no custom proved which would deprive the appellants of their right as Mahomedan ladies to inherit; and the respondent was well aware of the rights they had in the property. The view taken by the District Judge was correct, and should be restored.

The judgment of their Lordships was delivered by  
Nov. 26. LORD MACNAGHTEN. This appeal was heard *ex parte*.

The appellants are the female members of a Mohamedan family which in matters of worship have adopted the Hindu religion. There is no evidence that there is any custom in the family by which the Mohamedan law in regard to the descent of property has been altered or varied.

The respondent is a pleader of some standing. He took a mortgage of ancestral property from the male members of the family. He was under the impression that the Hindu law of descent prevailed in the family, and that the female members had no proprietary interest. He made no inquiry of any of the female members or of their husbands. They were

*purdahnashin* ladies, and naturally left the management of the property in the hands of the males.

The respondent brought this suit to enforce his security against the family property, making both the males and the females parties. The District Judge gave him a decree against the males, but dismissed the suits against the females with costs. On appeal, the High Court passed a decree against the females as well as against the males, and ordered the appellants to pay the costs of the appeal to the High Court.

The learned Judges of the High Court held that the male members "represented" the females in the transaction, because the females had not actively interfered with the property, and it appeared that in other transactions the male members of the family had dealt with the family property without the active concurrence of the females. There was no proof, nor indeed was there any suggestion, at least in the evidence, that the appellants or any of them had misled the respondent, either by word or by conduct.

In their Lordship's opinion the decree of the High Court is against all principle and authority.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court should be discharged with costs, and that the decree of the District Judge should be restored.

The respondent will pay the costs of the appeal.

*Appeal allowed.*

Solicitors for the appellants: *T. L. Wilson & Co.*

*J. V. W.*

1912

AZIMA BIBI  
v.  
SHAMALA-  
NAND.

## ORIGINAL CIVIL.

*Before Fletcher J.*

1912

Dec. 9.

MAHESHPUR COAL COMPANY, LD.

v.

JATINDRA NATH GUPTA.\*

*Attorney and Client—Practice—Refusal of Attorney to proceed until payment of costs already incurred—Discharge by Attorney—Acceptance of discharge by client—Order for change of Attorney—Payment of costs.*

A firm of attorneys refused to proceed further in the conduct of a suit unless their clients paid them as promised a certain sum on account of costs incurred :—

*Held*, that by so doing the attorneys discharged themselves, and the clients were entitled to an order for change of attorney without first paying the costs already incurred to the attorneys on the record.

*Held*, further, that the mere fact that after the attorneys' refusal the clients instructed them to brief counsel to apply for an adjournment of the suit, which instructions the attorneys declined to accept, did not amount to a refusal on the clients' part to recognize the discharge of the attorneys.

*Basanta Kumar Mitter v. Kusum Kumar Mitter* (1) and *Atul Chandra Mukerjee v. Shoshee Bhusan Mukerjee* (2) followed.

## APPLICATION.

This was an application in Chambers on behalf of the defendants, Jatindra Nath Gupta and Gopi Kristo Sen, for an order that Messrs. Manuel and Agarwalla should be appointed attorneys for the defendants in the place and stead of Messrs. Leslie and Hinds, the attorneys on the record.

The material facts were as follows : In the early part of September 1912 the accountant of Messrs. Leslie

\* Application in Original Civil Suit No. 694 of 1912.

(1) (1900) 4 C. W. N. 767.

(2) (1901) 6 C. W. N. 215.



and Hinds, one Mr. Belchambers, had an interview with the defendant Gopi Kristo Sen, and the latter promised to pay a substantial sum on account of attorneys' costs by the beginning of the following month, and also to pay counsel's fees when the case came on for hearing. This promise was not fulfilled, and accordingly, on the 7th October 1912, Messrs. Leslie and Hinds wrote a letter to the defendants of which the following are the material portions: "It is necessary that this (*i.e.*, payment) be done without delay otherwise we shall not be able to proceed in your matter when it is called on after the vacation."

No reply was received to this letter, but on the 21st November 1912 the defendant Gopi Kristo Sen called at Messrs. Leslie and Hinds' office and requested them to deliver briefs to counsel. This, however, Messrs. Leslie and Hinds refused to do unless they were put in funds to defray their out-of-pocket costs and the fees payable to counsel. Thereupon this application was made on the 29th November 1912, and ordered to be postponed. The defendants upon this instructed Messrs. Leslie and Hinds to brief counsel to apply for an adjournment of the suit pending the hearing of the application.

Messrs. Leslie and Hinds delivered a brief to counsel, but intimated to him that they could not hold themselves responsible for his fee. In these circumstances counsel returned the brief, and upon the defendants tendering the amount of the fee to Messrs. Leslie and Hinds the latter refused to accept it.

At the hearing of the application, Messrs. Leslie and Hinds through their counsel expressed their willingness to consent to the order for change of attorney being made upon payment to them of their taxed out-of-pocket costs.

1912

MAHESHPUR  
COAL  
COMPANY,  
LD.  
v.  
JATINDRA  
NATH  
GUPTA.

1912

MAHESHTUR  
COAL  
COMPANY,  
LD.  
v.  
JATINDRA  
NATH  
GUPTA.

*Mr. P. R. Das*, for the applicants. The practice of the Original Side is that when an attorney discharges himself the client is entitled to an unconditional order for change: *Basanta Kumar Mitter v. Kusum Kumar Mitter* (1), *Atul Chandra Mukerjee v. Shoshee Bhusan Mukerjee* (2). Before the Judicature Act the practice of the English Common Law Courts was that a change of solicitors could only be obtained upon payment of costs due; in Chancery the client was always entitled to a change. The old Common Law rule is only applicable in India to cases where the discharge is by client, not where as here the discharge is by the attorney.

The circumstances of this case amount to a discharge of the attorneys by themselves: *Robins v. Goldingham* (3). Cordery on the Law relating to Solicitors, 3rd edition, p. 105. *Underwood, Son, and Piper v. Lewis* (4).

*Mr. P. L. Buckland*, for Messrs. Leslie and Hinds the attorneys on record. In this case the discharge is by the clients and not by the attorneys. The clients expressly agreed to put the attorneys in funds and by failing to do so they discharged the attorneys. Even assuming that the discharge was by the attorneys, the clients by requiring them to brief counsel to apply for an adjournment showed that they did not accept such discharge and cannot now rely upon it. Reference was made to an order made by Sale J. on the 8th June 1906, in an unreported case No. 595 of 1904.

*Mr. P. R. Das*, in reply, cited *Bluck v. Lovering & Co.* (5).

*Cur. adv. vult.*

(1) (1900) 4 C. W. N. 767.

(3) (1872) L. R. 13 Eq. 440.

(2) (1901) 6 C. W. N. 215.

(4) [1894] 2 Q. B. 306.

(5) (1886) 35 W. R. 232.

FLETCHER J. This is an application for a change of attorneys by the defendants in the suit.

The applicants ask that the order for change be made without ordering the clients to pay to the attorneys the amount of their bill which may be found due on taxation, on the ground that the attorneys have discharged themselves.

It appears that in September last the accountant of the attorneys had an interview with one of the defendants, when the latter promised to make a payment on account of the attorneys' costs.

The clients having failed to fulfil their promise, the attorneys on the 7th October wrote to the clients pressing them to make the payment and informing them that "otherwise we shall not be able to proceed in your matter."

On the 21st November one of the clients called on the attorneys and requested them to brief two gentlemen as counsel in the suit, but the attorneys refused unless they were put in funds by the clients to pay the fees to counsel.

Now, pausing there for one moment, it seems to me on the authorities that the conduct of the attorneys in refusing to act for the clients unless the clients put them in funds to pay the fees on the briefs to counsel was a discharge of themselves by the attorneys.

The exact point was decided by Malins V.C. in the case of *Robins v. Goldingham* (1), which case has been followed and approved both in England and in this Court: see *Basanta Kumar Mitter v. Kusum Kumar Mitter* (2); *Atul Chandra Mukerjee v. Shoshee Bhusan Mookerjee* (3).

(1) (1872) L. R. 13 Eq. 440.

(2) (1900) 4 C. W. N. 767.

(3) (1901) 6 C. W. N. 215.

1912

MAHESHPUR  
COAL  
COMPANY,  
LD.  
C.  
JATINDRA  
NATH  
GUPTA.

1912

MAHESHPUR  
COAL  
COMPANY,  
LD.

v.

JATINDRA  
NATH  
GUPTA.

FLETCHER J.

It is said, however, that these cases are distinguishable on the ground that after the attorneys had discharged themselves the clients instructed them to instruct counsel to apply for an adjournment pending the hearing of the application for a change. If after receiving those instructions to brief counsel to apply for an adjournment the attorneys had expressed their willingness to go on with the litigation, there might have been a good deal to say on behalf of the attorneys, but even now the attorneys are not willing to go on with the litigation except on the footing that they are put in funds to pay at any rate the fees on briefs to counsel. The contract of the attorneys was an entire contract to carry on the litigation to its termination subject to their being paid.

The mere fact that the clients have expressly undertaken to put the attorneys in funds, which promise the clients have not performed, does not operate as a discharge by the clients: see *Bluck v. Lovering & Co.* (1). The demand of attorneys to be paid the amount of the fees on the briefs to be delivered to counsel was a discharge by the attorneys of themselves. But then it is said that although the clients might have accepted the discharge of the attorneys they did not in fact do so, but promised to put the attorneys in funds to carry on the litigation and therefore the discharge is by the clients. In support of that an order made by Sale J. on the 8th June 1906 in a suit No. 595 of 1904 (2) has been handed to me by the learned counsel for the attorneys. I have not been able to find any judgment of Sale J. on that application. It may be that the order in the form made by Sale J. was not opposed. But it appears clear that when an attorney refuses to proceed with the suit because the client does not put him

(1) (1886) 35 W. R. 232.

(2) Unreported.

in funds to conduct the litigation the attorney discharges himself: *Bluck v. Lovering & Co.*(1).

It makes no difference whether the promise to put the attorney in funds is made prior to or during the suit. I must, therefore, make the order for change in the form mentioned in the judgment of Ameer Ali J. in *Atool Chandra Mukerjee v. Shosee Bhusan Mukerjee* (2).

There will be no order as to the costs of this application.

*Application allowed.*

Attorneys for the applicants: *Manuel & Agarwalla. Leslie & Hinds* for themselves.

H. R. P.

(1) (1886) 35 W. R. 232.

(2) (1901) 6 C. W. N. 215.

## PRIVY COUNCIL.

SECRETARY OF STATE FOR INDIA

*v.*

MOMENT.

P.C.\*  
1912

Nov. 29 ;  
Dec. 10.

### [ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA, AT RANGOON.]

*Jurisdiction of Civil Court—Right of Suit against Secretary of State for India in Council—Burma Town and Village Lands Act (Burma Act IV of 1898), s. 41 (b)—Act taking away power of subject to sue Government to determine any right to land—Power of Lieutenant-Governor in Council to pass Act—Legislation ultra vires—India Councils Act, 1861, (24 & 25 Vict., c. 67), s. 22—Government of India Act, 1858, (21 & 22 Vict., c. 106), ss. 65, 66, 67.*

\* *Present*: THE LORD CHANCELLOR (LORD HALDANE), LORD MACNAGHTEN, LORD ATKINSON, LORD MOULTON, SIR JOHN EDGE, AND MR. AMEER ALI.

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
MOMENT.

*Held* (affirming the decision of the majority of a Full Bench of the Chief Court of Lower Burma), that section 41 (b) of the Burma Town and Village Lands Act (Burma Act IV of 1898) which enacted that "no Civil Court shall have jurisdiction to determine any claim to any right over land as against the Government," was *ultra vires* of the Lieutenant-Governor of Burma in Council, and therefore invalid.

Section 22 of the India Councils Act, 1861, (24 & 25 Vict., c. 67), provides that the Governor-General in Council shall have no power "to repeal or in any way affect (amongst other matters) any provision of the Government of India Act, 1858, (21 & 22 Vict., c. 106). And the effect of section 65 of the latter Act which enacted that, "all persons . . . shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the East India Company," was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East India Company. The words could not be construed in any different sense without reading into them a qualification which is not there, and may well have been deliberately omitted. The question was not one of procedure, but of the power of the Government to take away by legislation the right to proceed against them in a Civil Court in a case involving a right to land; and the suit in this case (for damages for interference with the respondent's property) was one which would have lain against the East India Company.

APPEAL from judgments and decrees (7th March 1910, and 23rd November 1911) of the Chief Court of Lower Burma, which respectively reversed and affirmed decrees (28th January 1908, and 28th November 1910) of the same Court in its Original Civil Jurisdiction.

The defendant was appellant to His Majesty in Council.

The only question for determination on this appeal was as to whether the enactment of the provisions contained in section 41(b) of the Lower Burma Town and Village Lands Act (Burma IV of 1898) was *ultra vires* of the Lieutenant-Governor of Burma in Council. That clause of section 41 was as follows:—"No Civil Court shall have jurisdiction to determine

any claims to any right over land as against the Government."

The respondent was owner of a house, stabling, etc., standing on land known as 36A Sandwith Road, in the Cantonment of Rangoon.

The appellant, on 30th August 1904, instituted a suit (301 of 1904) in the Chief Court for possession of the land on payment of compensation for the buildings erected thereon, in which suit, on 30th May 1905, the Court made a decree for possession, and directed the appellant to pay Rs. 1,590 as compensation. In execution of the decree the appellant took possession of the land and buildings on 18th September 1905, and through the Executive Engineer, Rangoon Division, issued orders in October 1905 for the sale of the buildings on the land by public auction, stating in the instructions to the auctioneers that the purchaser would be required to dismantle the buildings and clear the site within two weeks from the date of sale.

Meantime the respondent had appealed from the decree of 30th May 1905.

The auction sale was held on 11th December 1905, and the dismantling of the buildings was commenced shortly afterwards by the purchaser. On 12th December 1905 the Government Advocate wrote to the Executive Engineer asking him to stop the dismantling of the buildings as the respondent had filed an appeal, and pointing out that, if it were held on appeal that the Court had no jurisdiction in the matter, the site and buildings would have to be restored to the respondent. The dismantling was accordingly stopped.

On 18th December 1905 the respondent's appeal was heard, and the Chief Court in its Appellate Jurisdiction reversed the decree of 30th May, held that the

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
MOMENT.

1912  
SECRETARY  
OF STATE  
FOR INDIA  
v.  
MOMENT.

suit was barred under section 41 (b) of the Burma Act IV of 1898, and dismissed it with costs (1).

On 26th February 1906 possession of the land and buildings was restored to the respondent.

On 20th April 1906 a notice under Burma Act IV of 1898 was issued upon the respondent to quit and give up possession of the land within three months; and on 8th September 1906 the respondent, after due notice of action, instituted against the appellant the suit (304 of 1906) out of which the present appeal arose. In his plaint he claimed Rs. 2,010 as damages caused to his buildings by the dismantling of a portion of them in December 1905, and on account of the depreciation in value of the premises when restored to him; and Rs. 300 for subsequent damages with interest and costs of suit.

On 29th September a notice under section 21 of the above Act for immediate evacuation of the premises was served on the respondent, and he thereupon gave up possession of the land, and received compensation in full for the buildings in terms of the provisions of the Act.

The only defence to the suit now material was that the suit was barred by section 41 (b) of the said Act, and that question was tried as a preliminary issue, and the Judge of the Chief Court who heard the suit (MOORE J.) dismissed it on the 28th January 1908 on the ground that, with reference to that section and clause, the Court had no jurisdiction to entertain it.

The plaintiff appealed from that decision on the ground (*inter alia*) that section 41 (b) of the Act was *ultra vires*; and the question of law so arising was referred for consideration to a Full Bench of the Chief Court, and decided on 14th February 1910 by a majority of the Court (SIR C. E. FOX, Chief Judge, and

(1) (1905) 3 Lower Burma Rep. 165.



HARTNOLL and PARLETT JJ.) holding that it was *ultra vires*, whilst ROBINSON J. held that it was not.

On 7th March 1910 the appeal came on for hearing again before the Appellate Bench (SIR C. E. FOX and PARLETT J.) and judgment was delivered in accordance with the ruling of the Full Bench that section 41 (b) did not form a bar to the suit, inasmuch as it was *ultra vires* and therefore invalid. The suit was accordingly remanded for trial on the merits.

Ultimately on 28th November 1910 judgment was delivered in the Original Court, and a decree was made in favour of the plaintiff for Rs. 562 with costs which on an appeal by the defendant was on 23rd November 1911 affirmed by the Chief Court (ORMOND and TWOMEY JJ.) in its Appellate Jurisdiction, the appeal being dismissed with costs.

The report of the case before the Full Bench will be found reported in 5 Lower Burma Cases, 163.

The following were the most important of the Statutes referred to in the arguments and in the judgment of their Lordships.

The Government of India Act, 1858 (21 & 22 Vict., c. 106), sections 65, 66, and 67.

"65. The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate ; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company ; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company.

"66. The Secretary of State in Council shall, with respect to all actions, suits, and all proceedings by or against the said Company pending at the time of the commencement of this Act, come in the place of the said

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
MOMENT.

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
MOMENT.

company, and that without the necessity of substituting the name of the Secretary of State in Council for that of the said Company.

"67. All treaties made by the said Company shall be binding on Her Majesty, and all contracts, covenants, liabilities, and engagements of the said Company made, incurred, or entered into before the commencement of this Act may be enforced by and against the Secretary of State in Council in like manner and in the same Courts as they might have been by and against the said Company if this Act had not been passed."

The Indian Councils Act, 1861 (24 & 25 Vict. c. 67), section 22, so far as material to the present case.

"22. The Governor-General in Council shall have power at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now (or hereafter) under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all courts of justice whatever, and for all places and things whatever within the said territories and for all servants of the Government of India within the dominions of princes and states in alliance with Her Majesty ;

"and the laws and regulations so to be made by the Governor-General in Council shall control and supersede any laws and regulations in anywise repugnant thereto which shall have been made prior thereto by the Governors of the Presidencies of Fort St. George and Bombay respectively in Council, of the Governor or Lieutenant-Governor in Council of any presidency or other territory for which a Council may be appointed, with power to make laws and regulations under and by virtue of this Act.

"Provided always, that the said Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act,

"or any of the provisions of the Government of India Act, 1833, and of the Government of India Act, 1853, and of the Government of India Act, 1854, which after the passing of this Act shall remain in force :

"or any provisions of the Government of India Act, 1858, or of the Government of India Act, 1859."

On this appeal,

*Sir H. Erle Richards, K.C.*, and *A. M. Dunne*, for the appellant, contended that the Appellate Bench of the Chief Court erred in holding, in accordance with the decision of the Full Bench of that Court, that

section 41(b) of the Burma Town and Village Lands Act was *ultra vires* of the Lieutenant-Governor in Council and therefore invalid and not a bar to the respondent's suit being entertained by the Court. That might be the case if the section had taken away all remedy against the Government in claims by suit to rights over land; but, it was submitted, it did not do that, but merely took away the jurisdiction of the Civil Courts to try such a suit, without depriving the plaintiff of all remedy against the Government. The intention and meaning of section 65 of the Government of India Act, 1858 (21 & 22 Vict., c. 106), was merely that the rights generally of a subject should not be taken away, nor that his rights should always remain precisely similar to those he had against the East India Company. It allowed an alteration in particular modes of enforcing the rights of a subject, and left power to the Legislature to enact a different procedure for the prosecution of a particular right against the Government. When by the Bengal Rent Act (X of 1859) the right of suing for rent in the Civil Courts was taken away, it was not considered to be *ultra vires* on the part of the Government: see Field's Landlord and Tenant (2nd Ed., 1885), page 781, paragraph 445. Nor was it thought that section 65 of the Government of India Act, 1858, had been contravened by the passing of the Pensions Act (XXIII of 1871) which excluded the jurisdiction of the Civil Courts in certain cases; and apparently in the case of *Vasudev Sadashiv Modak v. The Collector of Ratnagiri* (1), that Act was not thought by this Board to be *ultra vires* of the Legislature. [THE LORD CHANCELLOR. The point was not raised in that case.] It was submitted that such a restricted meaning should not be given to section 65 of the Government of India Act of 1858

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
MOMENT.

1912  
 SECRETARY  
 OF STATE  
 FOR INDIA  
 v.  
 MOMENT.

as to make the alteration of the procedure or tribunal by which a remedy might be enforced by a subject beyond the power of the Legislature. Reference was made to the Government of India Act, 1833 (3 & 4 Will. IV., c. 85), the Preamble, and sections 1, 9, 10 and 43: Government of India Act, 1858 (21 & 22 Vict., c. 106), sections 1, 2, 65, 66, 67, 68: The India Councils Act, 1861 (24 & 25 Vict., c. 67), sections 22, 48. *The Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India* (1) in which the effect of section 65 of the Government of India Act, 1858, was considered, reference being made to pages 4, 5 and 7 [LORD ATKINSON referred to a passage at page 15 of the report of that case] and to the Burma Town and Village Lands Act (Burma IV of 1898), section 41(b).

*De Gruyther, K.C., E. U. Eddis and A. P. Pennell* for the respondent, were not heard.

Dec. 10.

The judgment of their Lordships was delivered by THE LORD CHANCELLOR. This appeal raises the question whether the Government of India could make a law the effect of which was to debar a Civil Court from entertaining a claim against the Government to any right over land. The question is obviously one of great importance. The proceedings out of which the appeal arises related to an ordinary dispute about the title to land, in the course of which there emerged a claim to damages for wrongful interference with the plaintiff's property. The only point which their Lordships have to decide is whether section 41(b) of the Act IV of 1898 (Burma) was validly enacted. A majority of the Judges of the Chief Court of Lower Burma have held that it was not, and the Secretary of State appeals against the judgment.

The section enacts that no Civil Court is to have jurisdiction to determine a claim to any right over land as against the Government. In the Court below it was held that this enactment was *ultra vires* as contravening a provision in section 65 of the Government of India Act, 1858, that there is to be the same remedy for the subject against the Government as there would have been against the East India Company.

Their Lordships are satisfied that a suit of this character would have lain against the Company. The reasons for so holding are fully explained in the judgment of Sir Barnes Peacock, C. J., in *The Peninsular and Oriental Company v. The Secretary of State for India*,<sup>(1)</sup> and the only question is whether it was competent for the Government of India to take away the existing right to sue in a Civil Court. This turns on the construction of the Act of 1858, and of the Indian Councils Act of 1861. Their Lordships have examined the provisions of the Acts of 13 Geo. III., c. 63, and 3 & 4 Wm. IV, c. 85, to which reference was made in the course of the argument, but these statutes do not appear to materially affect the argument.

The Act of 1858 declared that India was to be governed directly and in the name of the Crown, acting through a Secretary of State aided by a Council, and to him were transferred the powers formerly exercised by the Court of Directors and the Board of Control. The property of the old East India Company was vested in the Crown. The Secretary of State was given a quasi-corporate character to enable him to assert the rights and discharge the liabilities devolving on him as successor to the East India Company. The material words of section 65 enact that "the Secretary of State in Council shall and may sue

1912  
SECRETARY  
OF STATE  
FOR INDIA  
v.  
MOMENT.

(1) (1861) 5 Bom. H. C. App. A. 1.

1912

SECRETARY  
OF STATE  
FOR INDIA  
v.  
MOMENT.

and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company." Section 66 is a transitory provision making the Secretary of State in Council come in place of the Company in all proceedings pending at the commencement of the Act, without the necessity of a change of name. Section 67 is also a transitory provision making engagements of the Company entered into before the commencement of the Act binding on the Crown and enforceable against the Secretary of State in Council in the same manner and in the same Courts as they would have been in the case of the Company had the Act not passed.

By section 22 of the Indian Councils Act of 1861 the Governor-General in Council is given power to make laws in the manner provided, including power to repeal or amend existing laws, and including the making of laws for all Courts of Justice. But a proviso to this section enacts that there is to be no power to repeal or in any way affect, among other matters, any provision of the Government of India Act, 1858.

Their Lordships are of opinion that the effect of section 65 of the Act of 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East India Company. They think that the words cannot be construed in any different sense without reading into them a qualification which is not there, and which may well have been deliberately omitted. The section is not, like

the two which follow it, a merely transitory section. It appears, judging from the language employed, to have been inserted for the purpose of making it clear that the subject was to have the right of so suing and was to retain that right in the future, or at least until the British Parliament should take it away. It may well be that the Indian Government can legislate validly about the formalities of procedure so long as they preserve the substantial right of the subject to sue the Government in the Civil Courts like any other defendant, and do not violate the fundamental principle that the Secretary of State, even as representing the Crown, is to be in no position different from that of the old East India Company. But the question before their Lordships is not one of procedure. It is whether the Government of India can by legislation take away the right to proceed against it in a Civil Court in a case involving a right over land. Their Lordships have come to the clear conclusion that the language of section 65 of the Act of 1858 renders such legislation *ultra vires*.

It was suggested in the course of the argument for the appellant that a different view must have been taken by this Board in the case of *Vasudev Sadasiv Modak v. The Collector of Ratnagiri* (1). The answer is that no such point was raised for decision.

Their Lordships will humbly advise that the appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitor for the appellant: *The Solicitor, India Office.*

Solicitors for the respondent: *Sanderson, Adkin, Lee & Eddis.*

J. V. W.

(1) (1877) I. L. R. 2 Bom. 99 : L. R. 4 I. A. 119.

## APPELLATE CIVIL.

*Before Mookerjee and Holmwood JJ.*

MIDNAPORE ZEMINDARI Co., LD.

*v.*

MUKTAKESHI DASÍ.\*

*Jurisdiction of Civil Court—Revenue Court—Bastu or homestead land—  
Rent, suit for—Chota Nagpur Tenancy Act (Beng. VI of 1908), s. 139  
(3), cl. (a).*

The plaintiffs brought a suit in the Civil Court against the defendant for recovery of arrears of *bastu* rent. The defendant contended that as crops were grown on a portion of the *bastu* land, this land was agricultural, and suits in respect thereof were triable exclusively by the Revenue Court under the Chota Nagpur Tenancy Act :

*Held*, that the land in respect of which rent was claimed was *bastu* land, and consequently the suit was maintainable in the Civil Court.

*Ramdhun Khan v. Haradun Puramanick* (1), *Kalee Kishen Biswas v. Sreemutty Jankee* (2) and *Kumood Narain Bhoop v. Purna Chunder Roy* (3) referred to.

SECOND APPEAL by the Midnapore Zemindari Company, Ltd., the plaintiffs.

This was a suit for recovery of arrears of *bastu* rent, brought by the Midnapore Zemindari Company, Limited, against Muktakeshi Dasi, whose estate was under the management of the Manager of Encumbered Estates under the provisions of Act VI of 1876. The defendant held certain mouzas as Sirdar Ghatwal under the plaintiff company, and, on failure to pay *bastu* rent at a certain specified rate for the Fasli

\* Appeal from Appellate Decree, No. 1436 of 1911, against the decree of J. C. K. Peterson, District Judge of Manbhum, dated April 21, 1911, reversing that of Gopal Das Ghose, Munsif of Purnea, dated Dec. 12, 1910.

(1) (1869) 12 W. R. 404.

(2) (1867) 8 W. R. 250.

(3) (1878) I. L. R. 4 Calc. 547.



years 1315 and 1316, the plaintiff company brought a suit in the Civil Court for recovery of the same with interest. The defendant contended, *inter alia*, that, as crops were grown on a portion of the *bastu* land, the Civil Court had no jurisdiction to try this suit, which was triable only by the Revenue Court. This suit was decreed by the Court of first instance, but was dismissed on appeal. The plaintiff company, thereupon, appealed to the High Court.

1912  
MIDNAPORE  
ZEMINDARI  
CO., LD.  
v.  
MUKTAKESHI  
DASI.

*Dr. Rashbehary Ghose* (with him *Babu Jogesh Chandra Roy* and *Babu Sita Ram Banerjee*), for the appellants. Where the main feature of land is *bastu*, the mere cultivation of crop on a portion of the land, or the use of a portion of it for horticultural purposes, will not convert the land into an agricultural holding. Numerous cases have held this. The Chota Nagpur Tenancy Act, 1908, does not bar the ordinary jurisdiction of the Civil Courts. Under section 23 of Act X of 1859 certain suits, *e.g.*, suits for arrears of rent due on account of land, were cognisable by the Collector only. Under section 139 (3) of the Chota Nagpur Tenancy Act, 1908, suits for arrears of rent due on account of agricultural lands were cognisable by the Deputy Commissioner. Lands referred to in section 23 of Act X of 1859 are held to be agricultural or horticultural lands. The addition of the word "agricultural" in the Act of 1908 may give rise to difficulties, but, I submit, the word "lands" signifies the same as in the Act of 1859. The introduction of this Act of 1908 does not make any difference to the jurisdiction of the Civil Court. As regards the finding of the District Judge that the *bastu* land forms part of a *ghatwali* tenure, I submit that this finding was based on evidence introduced in the case at the time of the hearing of the appeal, and, therefore, ought not to have been relied upon, under the ruling in the case of *Kessowji Issur v.*

1912

MIDNAPORE  
ZEMINDARI  
Co., LD.  
v.  
MUKTAKESHI  
DASI.

*Great Indian Peninsula Railway Co.* (1) followed in the case of *Krishnama Chariar v. Narasimha Chariar* (2) and in a number of other cases. I submit therefore, that the Civil Court has jurisdiction to try this case: see *Kumood Narain Bhoop v. Purna Chunder Roy* (3).

*Babu Ram Charan Mitra*, for the respondent. My submission is that the tenure held by the respondent formed part of a *ghatwali* tenure, and suits for *ghatwali* lands lie in the Revenue Courts. Moreover, inasmuch as the lands in suit comprised both *bastu* and agricultural lands, it was not permissible for the appellants to split up their claim in respect to the lands and to bring their suit for a portion in the Civil Court. Having regard to the *ghatwali* character of the lands, the Revenue Court was the proper Court to have brought this suit in.

MOOKERJEE AND HOLMWOOD JJ. This is an appeal on behalf of the plaintiffs in a suit for *bastu* (homestead) rent. The defendant resisted the claim on the ground that as crops were cultivated on a part of the *bastu* and the *udbastu* adjoining thereto, the suit was triable exclusively by the Revenue Court under section 139, sub-section (3), clause (a) of the Chota Nagpur Tenancy Act, 1908. The Court of first instance overruled this objection, and decreed the suit on the merits. Upon appeal, the District Judge has reversed that decision on the ground that the suit is not maintainable in the Civil Court. In our opinion this view cannot be sustained.

Section 139, clause 3, provides that all suits for arrears of rent due on account of agricultural land, whether subject to the payment of rent or only to the

(1) (1907) I. L. R. 31 Bom. 381. (2) (1908) I. L. R. 31 Mad. 114.

(3) (1878) I. L. R. 4 Calc. 547.

payment of dues which are recoverable as if they were rent, shall be cognizable by the Deputy Commissioner, and shall be instituted and tried under the provisions of this Act, and shall not be cognizable in any other Court. The question, therefore, arises whether this is a suit for arrears of rent due on account of agricultural lands. Upon the pleadings, it is manifest that the rent is claimed in respect of *bastu* or homestead land. The circumstance that crops have been grown on a part of the land does not alter its character. This was pointed out in the case of *Ramdhan Khan v. Haradun Paramanick* (1) where Mr. Justice Markby relied upon the observation of Mr. Justice Phear in the case of *Kalee Krishen Biswas v. Jankee* (2), that to determine whether a case was governed by the provisions of Act X of 1859, what had to be considered was whether the main object was cultivation or habitation. In the case before us, the land in respect of which rent is claimed is *bastu* land, and, consequently, the suit is, *prima facie*, maintainable in the Civil Court.

The District Judge, however, has held that the suit is not so maintainable, because the *bastu* land forms part of a *ghatwali* property held by the defendant. This finding is open to criticism on the ground that it is based on evidence not adduced in the Court of first instance. As was pointed out by the Judicial Committee in the case of *Kessowji Issur v. Great Indian Peninsula Railway Co.* (3), which was applied in *Krishnama Chariar v. Narasimha Chariar* (4), "the legitimate occasion for section 568 of the Code of 1882 is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, and not where a discovery is made, outside the Court, of fresh evidence, and the application is made

1912  
MIDNAPORE  
ZEMINDARI  
CO., LD.  
v.  
MUKTAKESHI  
DASI.

(1) (1869) 12 W. R. 404.

(2) (1867) 8 W. R. 250.

(3) (1907) I. L. R. 31 Bom. 381.

(4) (1908) I. L. R. 31 Mad. 114.

1912

MIDNAPORE  
ZEMINDARI  
Co., LD.  
v.  
MUKTAKESHI  
DASI.

to import it; that is the subject of separate enactment in section 623." It has not been suggested before us that the documentary evidence admitted by the District Judge at the appellate stage was not available during the pendency of the trial in the Court of first instance. This additional evidence, therefore, ought not to have been received. But even if the evidence be received, how does it affect the case? The question in controversy is, what is the true character of the land for which rent is claimed; and not, whether it is part of a *ghatwali* property which includes agricultural land. It has finally been suggested that the plaintiff has attempted to split up the rent payable in respect of the *ghatwali* property. If this objection were well founded, the suit as framed would not be maintainable in any Court. But the previous litigation between the parties shows that the rent in respect of the *bastu* lands has been successfully claimed separately from the rent payable in respect of the other lands included in the *ghatwali* property. Consequently the fact that the *bastu* land now in dispute forms part of a *ghatwali* property, does not affect the decision of the question raised before us. The truth appears to be that, by some arrangement, the details whereof have not been disclosed in the present litigation, the defendants collected rent from the under-tenants, both in respect of the *bastu* lands and the agricultural lands and made them over to the plaintiffs, separately in respect of the two classes of lands. The suit, therefore, is clearly maintainable in the Civil Court: *Kumood Narain Bhoop v. Purna Chunder Roy* (1).

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored.

O. M.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Mookerjee and Beachcroft JJ.*

KULADA PRASAD PANDEY

v.

HARIPADA CHATTERJEE.\*

1912

Aug. 12.

*Hindu Law—Joint family—Mitakshara—Coparcenership—Presumption as to law governing family settling in province other than that of its origin—Transfer of the ancestral property—Liability of sons to pay the debts of their father—Conversion of some of the sons to Christianity, effect of—Status—Limitation—Removal of Caste Disabilities Act (XXI of 1850).*

The plaintiffs and the defendants Nos. 5 to 7 and the husbands of the defendants Nos. 8 and 9 were the sons of one Amrita Lal Pandey, whose father, a Hindu, governed by the Mitakshara law, was originally a resident of Oudh, but, subsequently, migrated to, and settled in, the district of Bankura, where he acquired properties and continued to live jointly with his family. The defendants Nos. 1 to 4 were the transferees of the ancestral property which formed the subject-matter of this suit. On the 19th March 1900, Amrita Lal Pandey executed a deed of conveyance, whereby he transferred his ancestral property to the defendants Nos. 1 to 4, in satisfaction of certain debts incurred by him in 1892 and 1895. He was joined in this conveyance by the defendants Nos. 5 to 7. On the 26th December, 1900, Amrita Lal Pandey died, leaving him surviving six sons, viz., the plaintiffs and the defendants Nos. 5 to 7, as also the widows of his two sons who had pre-deceased him in 1880 and 1883, respectively. Of the six sons, the plaintiffs Nos. 1 and 2 had been converted to Christianity in 1890 and 1896 respectively, the defendant No. 5 became a convert to the same faith in 1904, and the plaintiff No. 3 attained his majority in 1902. On the 19th March, 1907, the plaintiffs filed their suit against the defendants Nos. 1 to 4 for a declaration of the plaintiffs' title to a three-seventh share of the ancestral property and for recovery of *khas* possession and mesne profits, and made the defendants Nos. 5 to 9 *pro forma* defendants :

\* Appeal from Appellate Decree, No. 2891 of 1909, against the decree of J. M. Ghosh, District Judge of Bankura, dated Aug. 27, 1909, confirming the decree of Gopal Chandra Bose, Subordinate Judge of Bankura, dated June 29, 1908.

1912

KULADA  
PRASAD  
PANDEY  
v.  
HARIPADA  
CHATTERJEE.

*Held*, that when the grandfather of the plaintiffs migrated from Oudh to Bengal, the presumption was, that he carried with him the laws and customs as to succession and family relations prevailing in the province from which he came. Such a presumption might, however, have been rebutted by proof that the family had adopted the law and usages of the place to which he had migrated.

*Held*, also, that in 1890, by reason of his conversion to Christianity, the first plaintiff ceased to be a member of the joint Hindu family, but that thenceforward he continued to hold the ancestral property as joint owner, and was entitled to recover possession of one-seventh share of the property, on the basis that in 1890, upon the dissolution of the family, he became entitled to such share.

*Jalbhai Ardeshir Shet v. Louis Manoel* (1) and *Lastings v. Gonsulves* (2) distinguished.

*Held*, further, that the second plaintiff, upon his conversion to Christianity in 1896, ceased to be a member of the joint family, and was not bound by the conveyance of the 19th March 1900, but that he was liable to satisfy the debts of his father, incurred and charged upon the ancestral property prior to the date of his conversion.

*Ram Pershad Singh v. Lakhpati Koer* (3), *Balabux v. Rukhmabai* (4), and *Balkishen Das v. Ram Narain Sahu* (5) distinguished.

*Held*, further, that Amrita Lal Pandey was competent in 1900 to alienate the ancestral property in his hands, not merely in respect of his own interest, but also that of the third plaintiff.

SECOND APPEAL by Kulada Prasad Pandey and others, the plaintiffs.

The plaintiffs brought a suit against the transferees of a certain ancestral property and others, for a declaration that the transfer was not operative against them in respect of a three-seventh share of the property, and for recovery of *khas* possession and mesne profits. The plaintiffs and the defendants Nos. 5 to 7 and the husbands of the defendants Nos. 8 and 9 were the sons of one Amrita Lal Pandey, while the transferees of the property were the principal defendants Nos. 1 to 4. Some time

(1) (1894) I. L. R. 19 Bom. 680. (3) (1902) I. L. R. 30 Calc. 231.

(2) (1899) I. L. R. 23 Bom. 539. (4) (1903) I. L. R. 30 Calc. 725.

(5) (1903) I. L. R. 30 Calc. 738.

in 1857, the father of Amrita Lal Pandey, originally a resident of Oudh and a Hindu governed by the Mitakshara law, settled down in the district of Bankura, where he acquired certain properties. Amrita Lal Pandey, after his father's death, obtained possession of these properties as heir, and continued to live jointly with his sons, as Hindus governed by the Mitakshara law. In 1880 and 1883 two of his sons, the husbands of the defendants Nos. 8 and 9, predeceased him. In 1890, 1896 and 1904 three other of his sons, the plaintiffs Nos. 1 and 2, and the defendant No. 5, respectively, became converts to Christianity, and, since their conversion, did not observe the rules of the Hindu religion, though the plaintiffs Nos. 1 and 2 from time to time lived in their father's home, whenever they were not compelled to be away from it for purposes of gain and service at different places. Amrita Lal Pandey having incurred certain debts, executed two mortgage bonds on the 18th March, 1892, and the 3rd August, 1895, respectively, and on the 19th March 1900, he transferred his ancestral property for the sum of Rs. 2,000 to the defendants Nos. 1 to 4 by a conveyance, in which he was joined by his three sons, the defendants Nos. 5 to 7. On the 26th December, 1900, Amrita Lal Pandey died, leaving him surviving six sons, two of whom were Christians at the time, the third becoming a Christian subsequently in 1904 as aforesaid, and the widows of his two deceased sons. In 1902 the plaintiff No. 3 attained majority. On the 19th March 1907 the plaintiffs filed the present suit against the defendants Nos. 1 to 4, and made the defendants Nos. 5 to 9 *pro forma* defendants in the suit. In the plaint it was alleged that the plaintiffs and the defendants Nos. 5 to 7, with their father, formed a joint Hindu family, governed by the Mitakshara law, that as the property in suit was ancestral and there

1912

KULADA  
PRASAD  
PANDEY  
v.HARIPADA  
CHATTERJEE.

1912

KULADA  
PRASAD  
PANDEY  
v.  
HARIPADA  
CHATTERJEE.

was no partition of the same, the plaintiffs and the defendants Nos. 5 to 7 were each entitled with their father to an equal share of the same, that the transfer of the 19th March, 1900 was effected for the satisfaction of illegal and immoral debts of their father, and was, consequently, inoperative as against their share in the property in dispute. The defendants Nos. 1 and 2 alone contested this suit, and in their written statement they contended, *inter alia*, that the plaintiffs Nos. 1 and 2, having become Christians, had renounced Hinduism, and after their conversion had never lived jointly with their father, that they had, consequently, lost all interest in the ancestral property, that the debts of Amrita Lal Pandey were legal debts and the transfer of the 19th March, 1900, was valid and operative, and that in any event the plaintiff No. 3, who is still a Hindu, was liable to satisfy the debts of his father. They further contended that this suit was barred by limitation, and and that, inasmuch as the plaintiff No. 3 had attained majority in 1902, and had failed to obtain cancellation of the conveyance within three years therefrom, he was barred by limitation. Both the Courts below dismissed this suit. The plaintiffs, thereupon, appealed to the High Court.

*Babu Golap Chandra Sarkar* (with him *Babu Dwarkanath Mitter*), for the appellants. When one of the members of a Hindu family becomes a Christian, a necessary change is brought about in the status of the family. His conversion to Christianity causes, not only a severance between him and the rest of the family, but also a complete dissolution of the whole family, and from that period all the members must be taken in law to have been no longer members of the joint family. As to the effect of the change of



religion on the status of the family, I rely on the following cases: *Abraham v. Abraham* (1), *Gobind Krishna Narain v. Abdul Qayyum* (2), *Ram Pershad Singh v. Lakhpatri Koer* (3), *Balabux v. Rukhmabai* (4) and *Balkishen Das v. Ram Narain Sahu* (5). In the case of *Gobind Krishna Narain v. Khunni Lal* (6), which subsequently went up on appeal to the Privy Council (7), this effect of the change of religion was not considered.

In view of the principles laid down in the cases of *Krishnasami Konan v. Ramasami Ayyar* (8) and *Rathna Naidu v. Aiyanaachariar* (9), a separated son, under the Hindu law, is not liable to pay the debts of his father, nor is it open to the father to deal with the property of his divided son, so as to bind the latter, even though the debts be antecedent to the severance.

In the present case the family lived up to 1890 as members of an undivided Hindu family governed by the Mitakshara law. In that year the first plaintiff became a Christian, and a disruption of the family took place. None of the debts of the father were contracted before this conversion. A second disruption took place when the second plaintiff was converted to Christianity, after the father had already incurred certain debts, but before the alienation of the ancestral property. The third plaintiff, who remained a Hindu, attained his majority in 1902, after the alienation of the ancestral property in 1900, and prior to the date of the suit in 1907. The fifth defendant became a convert to Christianity in 1904. Having

1912

KULADA  
PRASAD  
PANDEY  
v.  
HARIPADA  
CHATTERJEE.

(1) (1862) 9 Moo. I. A. 195.

(6) (1907) I. L. R. 29 All. 487.

(2) (1903) I. L. R. 25 All. 546.

(7) (1911) I. L. R. 33 All. 356 ;

(3) (1902) I. L. R. 30 Calc. 231.

L. R. 38 I. A. 87.

(4) (1903) I. L. R. 30 Calc. 725.

(8) (1899) I. L. R. 22 Mad. 519.

(5) (1903) I. L. R. 30 Calc. 738.

(9) (1908) 18 Mad. L. J. 599.

1912

KULADA  
PRASAD  
PANDEY  
v.HARIPADA  
CHATTERJEE.

regard to the principles of law I have stated, and to above mentioned facts, and by virtue of the provisions of the Removal of Caste Disabilities Act, XXI of 1850, whereby the conversion to Christianity does not operate as a bar to the plaintiffs' recovering their share in the ancestral property, my submission is that the plaintiffs are entitled to a three-sevenths share in the property. This suit was brought within 12 years from the period when the alienation took place and, consequently, under the provisions of the Limitation Act, XV of 1877, Schedule II, article 26, this suit was not time-barred.

*Babu Harendra Narayan Mitter* (with him *Babu Satish Chandra Mookerjee*), for the respondents. Upon conversion to Christianity a disruption took place among the members of the family. It was, however, open to the person converted not to renounce the Hindu law, but to continue to be joint and to abide by this law, retaining coparcenership, together with its rights and liabilities, as a member of a Hindu family. The law laid down in *Abraham v. Abraham* (1) has not been abrogated since. Where an election has been made to abide by the old law, the party takes the property, subject to the rights and liabilities of a Hindu family: see *Francis Ghosal v. Gabri Ghosal* (2). The case of *Nepin Bala Debi v. Sitikantha Banerjee* (3) was decided with reference to succession to a Hindu estate, and it has been held in *Francis Ghosal v. Gabri Ghosal* (2) that the Succession Act did not affect coparcenership. In the case of *Nanomi Babuasin v. Modhun Mohun* (4) there is a discussion as to a Mitakshara son. He takes a vested interest and is liable for his father's debts. The mere fact of conversion would not dissolve the tie in the manner

(1) (1863) 9 Moo. I. A. 195.

(3) (1910) 12 C. L. J. 459.

(2) (1906) I. L. R. 31 Bom. 25.

(4) (1885) I. L. R. 13 Calc. 21.

urged by the appellants. Looking at the plaint, the appellants chose to abide by the Hindu law. It contains no allegation that there ever was a separation among them. They were never separated, and they continued to hold the ancestral property subject to coparcenary with the right of survivorship. I submit, therefore, that there was a pious obligation on the sons to pay their father's debts, and it was not open to them at this stage of the proceedings to change front, and to say that they were divided members, and that the case ought not to be tried as if they were members of a joint Hindu family, governed by the Mitakshara law.

The reason for framing the plaint as it has been done is, to my mind, for the purpose of getting round limitation. I rely on the case of *Lastings v. Gonsalves* (1), and if the law, as propounded there, is true with reference to a body as a whole, I submit it is also true in, and should be applied to, the case where one member is converted: see also *Jalbhai Ardeshir Shet v. Louis Manoel* (2) and *Francis Ghosal v. Gabri Ghosal* (3). As regards limitation, the plea has been taken in the written statement. The suit was barred, as it was filed more than 12 years from the date of the first conversion, when the disruption was alleged to have taken place. At all events, it was barred as against the third plaintiff, who, if he had intended to dispute the title of the transferees, should have filed the suit within three years of his attaining majority. This appeal, therefore, must be dismissed.

*Babu Golap Chandra Sarkar*, in reply. It has been found by the Court of first instance that the parties in this suit were not living as joint, and this

1912

KULADA  
PRASAD  
PANDEY  
v.  
HARIPADA  
CHATTERJEE.

(1) (1899) I. L. R. 23 Bom. 539. (2) (1894) I. L. R. 19 Bom. 680.

(3) (1906) I. L. R. 31 Bom. 25.

1912

KULADA  
PRASAD  
PANDEY  
v.HARIPADA  
CHATTERJEE.

finding has not been set aside by the Appellate Court. There was no finding of coparcenership. Where there has been a separation, in the absence of an express agreement to the contrary, the presumption is that all the members of the family became separate: see *Ram Pershad Singh v. Lakhpatri Koer* (1), *Balabux v. Rukhmabai* (2) and *Balkishen Das v. Ram Narain Sahu* (3). The effect of separation of one would be in theory a separation of all. The mere fact of living together gives rise to no presumption. No subsequent alienation would be binding on any one of the members: see *Ramachandra Padayachi v. Kondayya Chetti* (4).

*Cur. adv. vult.*

MOOKERJEE AND BEACHCROFT JJ. The subject matter of this litigation is ancestral immovable property, owned at one time by a Hindu family, of which one Amrita Lal Pandey was the head. The father of Amrita Lal Pandey, originally resident in Oudh, in 1857 migrated to Bengal, where he continued to live with his family in the district of Bankura, and acquired the properties now in dispute, which passed after his death to his sons. Amrita Lal had eight sons, of whom two, the husbands of the eighth and ninth defendants, respectively, died in his life-time, in 1880 and 1883. Three other sons, the first and the second plaintiffs and the fifth defendant, embraced the Christian faith; the first plaintiff became a convert in 1890, the second plaintiff in 1896, and the fifth defendant in 1904. On the 19th March, 1900, Amrita Lal transferred the disputed property for a sum of Rs. 2,000 to the first four defendants, and he was joined in the execution of the conveyance by three of his sons, the fifth, sixth and

(1) (1902) I. L. R. 30 Calc. 231.

(3) (1903) I. L. R. 30 Calc. 738.

(2) (1903) I. L. R. 30 Calc. 725.

(4) (1901) I. L. R. 24 Mad. 555.

seventh defendants. Amrita Lal died on the 26th December, 1900. The third plaintiff, one of the sons of Amrita Lal, attained majority in 1902. On the 19th March, 1907, the plaintiffs, the three sons of Amrita Lal who had not joined him in the conveyance, and of whom two were Christians at the time of the transfer, while the other was, and is still, a Hindu, commenced the present action for declaration that the transfer was not operative against them in respect of a three-seventh share of the property, and for recovery of *khas* possession and mesne profits. The plaintiffs founded their claim on the assumption that the transfer had been effected for the satisfaction of illegal and immoral debts of their father, which they would otherwise be presumably liable to satisfy out of their share of the ancestral property. The purchasers-defendants contested the claim, and alleged that the plaintiffs who had embraced Christianity had lost all interest in the ancestral property, that the other plaintiff, who was still a Hindu, was liable to satisfy the debt, and that in any event his claim was barred by limitation, as he had attained majority in 1902 and had failed to obtain cancellation of the conveyance within three years thereof. The Courts below have concurrently dismissed the suit. They have found that the debts satisfied by the consideration for the conveyance were neither illegal nor immoral, and that, consequently, the father could make a valid alienation of the ancestral property for the discharge of those debts. The plaintiffs have appealed to this Court, and on their behalf the decision of the District Judge has been assailed on two grounds, namely, *first*, that the two plaintiffs who had embraced Christianity during the life-time of their father, had, by reason of their conversion to the Christian faith, ceased to be members of a joint Hindu family, and were consequently not liable to satisfy any

1912

KULADA  
PRASAD  
PANDEY  
v.HARIPADA  
CHATTERJEE.

1912

KULADA  
PRASAD  
PANDEY  
v.HARIPADA  
CHATTERJEE.

debts incurred by their father; and, *secondly*, that the effect of the conversion of the first two plaintiffs to Christianity was a complete dissolution of the family, and, that, from this point of view, it was not competent to Amrita Lal to alienate the share of the third plaintiff who did not join him in the conveyance, and could not do so, as he was an infant at the time. These positions have been controverted on behalf of the respondents as unsound in law, and it has further been suggested that the plaintiffs have sought to put forward a case inconsistent with that set out in the plaint, though it has not been disputed that it is in some measure conformable to the position taken up by the defendants in their written statement.

Before we deal with the questions argued at the Bar, it is necessary to premise that the family must be taken, before the conversion of the first plaintiff to Christianity, to have been governed by the Mitakshara law. When the grandfather of the plaintiffs migrated from Oudh to Bengal, the presumption is that he carried with him the laws and customs as to succession and family relation prevailing in the province from which he came: *Parbati Kumari Debi v. Jagadis Chunder Dhabal* (1). This presumption might have been, but has not been, rebutted by proof that the family has adopted the law and usages of the place to which it has migrated: *Soorendronath Roy v. Mussamut Heeramonee Burmoneath* (2), *Govind Chandra Das v. Radha Kristo Das* (3), *Jagannath Raghunath v. Narayan Lal Shethe* (4). We start, therefore, with the position that, in 1890, there was a Hindu family, consisting of Amrita Lal Pandey and his six sons, and owning immovable property which had descended

(1) (1902) I. L. R. 29 Calc. 433; (2) (1868) 12 Moo. I. A. 81.

L. R. 29 I. A. 82.

(3) (1909) I. L. R. 31 All. 477.

(4) (1910) I. L. R. 34 Bom. 553.

from the father of Amrita Lal. In 1890, one of the sons of Amrita Lal, the first plaintiff, Kulada Prasad, became a convert to Christianity. What was the legal effect of this incident upon the family, and upon the rights of Kulada Prasad himself? In so far as the latter question is concerned, it is clear that, under the Caste Disabilities Removal Act (Act XXI of 1850), the conversion did not inflict on him forfeiture of rights or property, or impair or affect in any way any right of inheritance. The inference is, therefore, irresistible that, notwithstanding his conversion, the first plaintiff retained his interest in the ancestral property. In so far as the question of the status of the family is concerned, it is equally indisputable that it ceased to be a joint Hindu Mitakshara family. This position has not been seriously controverted; but it has been ingeniously argued that, notwithstanding the conversion of one of the members to Christianity, they continued to hold the ancestral property subject to the operation of the rule of survivorship, and of the principle which imposes a pious obligation on a Hindu son to pay his father's debts. This view, in our opinion, is opposed to the decision of the Judicial Committee in *Abraham v. Abraham* (1), where Lord Kingsdown referring to the position of a member of a Hindu family who has become a convert to Christianity, observed as follows: "He becomes at once severed from the family, and is regarded by them as an outcaste. The tie which bound the family together is, so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon, and connected with, the tie must be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must equally be put an end to by severance which the Hindu law recognises and creates. Upon the

1912

KULADA  
PRASAD  
PANDEY  
P.HARIPADA  
CHATTERJEE.

(1) (1863) 9 Moo. I. A. 195.

1912

KULADA

PRASAD

PANDEY

r.

HARIPADA

CHATTERJEE.

conversion of a Hindu to Christianity the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion; or if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion." Stress, however, has been laid by the respondents upon the concluding sentence of this passage, and it has been argued that a Hindu family, converted to Christianity, may continue to be joint, even after conversion, and if the fact be established, effect will be given to it. In support of this position, reference has been made to *Francis Ghoshal v. Gabri Ghoshal* (1). This doctrine, even if it be assumed to be well founded, is of no assistance to the respondents; but it is worthy of note that there is divergence of judicial opinion on the subject: *Tellis v. Saldanha* (2). Here the whole family was not converted to Christianity, and this circumstance differentiates the present case from *Jalbhai Ardeshir Shet v. Louis Manoel* (3) and *Lastings v. Gonsalves* (4). If all the members of the family had become Christians, the position might possibly have been supported that, notwithstanding conversion, they adhered to the old law, and that consequently the rights of coparcenership were not affected by their renunciation of the old religion. In the present case such a theory cannot possibly be maintained; one of the members renounced the old religion, the others continued their adherence to the ancestral faith. If the family is deemed to have continued as a joint family, with right of survivorship among the coparceners, it could only have been by common consent of all the members; but there is no indication that the members of the family had, or indeed could

(1) (1906) I. L. R. 31 Bom. 25.

(3) (1894) I. L. R. 19 Bom. 680.

(2) (1886) I. L. R. 10 Mad. 69.

(4) (1899) I. L. R. 23 Bom. 539.



have, any such intention. We must hold, then, that the first plaintiff, upon his conversion to Christianity, became at once severed from the family, and this view is supported by the cases of *Gobind Krishna Narain v. Abdul Qayyam* (1) and *Khunni Lal v. Gobind Krishna Narain* (2) where their Lordships of the Judicial Committee reversed the decision in *Gobind Krishna Narain v. Khunni Lal* (3). In so far, therefore, as the first plaintiff is concerned, he is not bound by the conveyance of the 19th March, 1900, and it is inoperative in respect of what was his share in ancestral property in 1890. His claim to recover possession thereof is also plainly not barred by limitation. By reason of his conversion he ceased to be a member of the joint Hindu family, but thenceforward he continued to hold the property as joint owner. There is no evidence of his exclusion or assertion of hostile title against him, such as is essential to constitute adverse possession between co-owners [*Jogendra Nath Rai v. Baldeo Das* (4)], before the conveyance of the 19th March, 1900, when his father professed to deal with the property, though he was not competent to do so under the law. No question of limitation, therefore, arises, as the suit has been commenced within twelve years from the date of the conveyance. The first plaintiff is thus entitled to recover possession of an one-seventh share of the property, on the basis that, in 1890, upon the dissolution of the family, which consisted at the time of Amrita Lal and his six sons, the plaintiff became entitled to such share.

We next proceed to consider the case of the second plaintiff, who became a convert to Christianity in 1896. It has been contended on behalf of the appellant that

1912

KULADA  
PRASAD  
PANDEY  
v.HARIPADA  
CHATTERJEE.

(1) (1903) I. L. R. 25 All. 546.

(3) (1907) I. L. R. 29 All. 487.

(2) (1911) I. L. R. 33 All. 356 ;

(4) (1907) I. L. R. 35 Cal. 961,

L. R. 38 I. A. 87,

1912

KULADA  
PRASAD  
PANDEY  
v.HARIPADA  
CHATTERJEE.

when the first plaintiff became a convert in 1890, the legal effect was not merely his severance from the rest of the family, but a complete dissolution of the entire family, and that, from that time onwards, all the members must be taken in law to have been no longer members of the joint family. In support of this proposition, reference has been made to the decision of their Lordships of the Judicial Committee in the cases of *Ram Pershad Singh v. Lakhpatri Koer* (1), *Balabux v. Rukhmabai* (2) and *Balkishen Das v. Ram Narain Sahu* (3). These cases are, in our opinion, distinguishable, and are of no assistance to the appellants. No doubt there may be no presumption that, when one coparcener separates from the others, the latter remain united; the separation of one may be a virtual separation of all, and in this sense, where it is asserted that the remaining members remained united, or agreed to reunite, the fact has to be established from all the circumstances of the case. In the case before us the inference is irresistible that, after the conversion of the first plaintiff to Christianity in 1890, the remaining members continued to form a joint Hindu family. In 1896, therefore, when the second plaintiff, Gopeshwar, embraced Christianity, he ceased to be a member of the joint family, and it became thereafter incompetent to his father to alienate his one-seventh share by the conveyance of the 19th March, 1900. The second plaintiff is thus not bound by that conveyance, and so far as he is concerned no question of limitation arises, because his severance from the family took place within twelve years of the commencement of the suit. But a question of considerable nicety arises as to the terms, if any, subject to which he should be allowed to recover his share of the property. The debts, for the

(1) (1902) I. L. R. 30 Calc. 231. (2) (1903) I. L. R. 30 Calc. 725.

(3) (1903) I. L. R. 30 Calc. 738.

satisfaction whereof the conveyance was executed, were in part incurred on the 18th March, 1892, and 3rd August, 1895, under mortgage bonds executed by his father, Amrita Lal. When, in 1896, he became a convert to Christianity, he was liable to satisfy these debts, some of which, in fact, were charged upon the ancestral property. Consequently he may, in our opinion, be justly called upon to bear a share of these debts. Reliance, however, has been placed by the appellants upon the cases of *Krishnasami Konan v. Ramasami Ayyar* (1) and *Rathna Naidu v. Aiyanachariar* (2) to show that it is not open to a Hindu father to deal with the property of his divided son, so as to bind the latter, even though it be in respect of an antecedent debt. This doctrine, if it be assumed to be well founded, is, as is explained in the first of the cases mentioned, subject to the important qualification that the severance had not been made with a view to defraud or delay creditors. It is further worthy of note that the case of *Krishnasami Konan v. Ramasami Ayyar* (1) was distinguished in *Ramachandra Padayachi v. Kondayya Chetti* (3). In the case before us, we are clearly of opinion that the plaintiff ought not to be allowed to recover his one-seventh share of the property, except upon payment of a proportionate share of the debts due under the bonds of the 18th March, 1892, and 3rd August, 1895, and of other debts which could be recovered by sale of his share of the ancestral property at the time of his conversion, in 1896. This amount we have approximately determined to be Rs. 210. The second plaintiff is entitled to a decree on these terms.

We have finally to consider the case of the third plaintiff. He is plainly not entitled to any assistance from the Court. The theory that, in 1890 or 1896, there

(1) 1899) I. L. R. 22 Mad. 519. (2) (1908) 18 Mad. L. J. 599.

(3) (1901) I. L. R. 24 Mad. 555.

1912

KULAPA  
PRASAD  
PANDEY  
v.

HARIPADA  
CHATTERJEE.

1912

KULADA  
PRASAD  
PANDEY  
v.HARIPADA  
CHATTERJEE.

was a complete disruption of the family, and each member continued thereafter to live as a separate unit, has already been found unsustainable. Amrita Lal, therefore, was competent in 1900 to alienate the ancestral property in his hands, not merely in respect of his own interest, but also that of his sons, other than the first two plaintiffs. The third plaintiff must consequently be bound by the conveyance of 1900.

It is worthy of note that an objection as to misjoinder of causes of action might possibly have been taken in the Court of first instance, if the case had been presented in that Court from the point of view developed here. No such objection, however, was taken, and it is obvious that the parties have not been prejudiced by the frame of the suit; consequently, as explained in the case of *Sarala Sundari Dassi v. Sarada Prosad Sur* (1), effect could not be given to the objection of misjoinder, even if it had been urged before us.

The result is that this appeal is allowed, and the decrees of the Courts below discharged. The first plaintiff will have a decree for possession of one-seventh share of the disputed property, with mesne profits only from the date of the suit, the amount to be determined by a supplementary proceeding in the Court of first instance. The second plaintiff will similarly have a decree for one-seventh share of the property, with mesne profits from the date of the suit, but in his case the amount of mesne profits will be reduced by Rs. 210 which, we have held, is payable by him to the contesting defendants. The claim of the third plaintiff will stand dismissed. Under the circumstances, we direct all the parties to bear their own costs of this litigation in all the Courts.

O. M.

*Appeal allowed.*

**ORIGINAL CIVIL.**

*Before Fletcher J.*

**THADDEUS**

*v.*

**JANAKI NATH SAHA.\***

1912

Dec. 2

*Sanction for prosecution—Criminal Procedure Code (Act V of 1898), s. 195  
—Verbal application—Jurisdiction—Revocation—Power of Court granting sanction—Practice.*

Where a verbal application was made by counsel for sanction to prosecute under section 195 of the Criminal Procedure Code and granted by the Court, but no order could be drawn up, as the application was not made upon formal petition :

*Held*, that upon a formal petition being subsequently presented, the Court had jurisdiction to grant such sanction, the former sanction being inoperative.

*Held*, further, that a Judge sitting on the Original Side has no jurisdiction to revoke a sanction previously granted by him, and that application for such revocation must be made to a Civil Appellate Bench of the Court.

*Kali Kinkar Sett v. Dinobandhu Nandy* (1) discussed.

**MOTION.**

This was a Rule obtained on September 5th, 1912, by one of the defendants, Brojendra Nath Saha, calling upon the plaintiffs to show cause why an order, dated May 27th, 1912, granting sanction under section 195 of the Criminal Procedure Code to prosecute the said defendant, Brojendra Nath Saha, should not be set aside, and the said sanction revoked.

The following are the material facts. The suit was instituted by the plaintiffs under O. XXXVII

\* Application in Original Civil Suit No. 460 of 1911.

(1) (1905) I. L. R. 32 Calc. 379.

1912

THADDEUS

v.

JANAKI  
NATH SAHA.

of the Civil Procedure Code, to recover money due to them from the defendants upon certain promissory notes. Upon an affidavit sworn by the defendant, Brojendra Nath Saha, in which he denied the execution of the notes, leave was given to defend the suit. The defendant, however, subsequently admitted in writing to the plaintiffs that the statements made by him in the affidavit were false, and on September 1st, 1911, Harington J. granted the plaintiffs a decree *ex parte* for the full amount claimed, with interest and costs.

Counsel for the plaintiffs thereupon made a verbal application for sanction to prosecute the defendant, Brojendra Nath Saha, under sections 193, 199, and 200 of the Indian Penal Code, and this application was granted by the learned Judge. The order for sanction was not embodied in the decree, nor was a separate order drawn up, on the ground that the sanction was not based on a written petition.

In these circumstances, on May 27th, 1912, a formal petition for sanction, with a copy of the Court minute of September 1st, 1911, attached, was presented before Fletcher J. and an order for sanction passed thereon.

On July 27th, 1912, a warrant was issued for the arrest of Brojendra Nath Saha, but was not executed.

*Mr. K. N. Chaudhuri* and *Mr. F. S. R. Surita* showed cause. It has been held in *Kali Kinkar Sett v. Dinobandhu Nandy* (1) that a Judge sitting on the Original Side of the High Court has no power to extend the time during which a sanction to prosecute granted by him is to remain in force; *a fortiori* he has no power to revoke such a sanction.

*Mr. Eardley Norton*, *Mr. C. R. Das* and *Mr. Nisith C. Sen*, in support of the Rule. The sanction

granted by Fletcher J. was without jurisdiction, because sanction had already been granted by Harington J. on September 1st, 1911. That this sanction was merely verbal is immaterial, since sanction need not be in writing: *The Queen v. Kristna Rau* (1).

1912  
THADDEUS  
v.  
JANAKI  
NATH SAHA.

The order of May 27th, 1912, cannot be regarded as an extension of the sanction of September 1st, 1911, for such extension can only be granted if the sanction is still unexpired, and by a Civil Appellate Bench of the Court: *Kali Kinkar Sett v. Dinobandhu Nandy* (2).

On the merits, the plaintiffs are disentitled to their order for sanction, by reason of their delay, which they have not explained: *Balwant Singh v. Umed Singh* (3), *Ram Nath Chamar v. Ram Saran Lall* (4), *Dharamdas Kamar v. Sagore Santra* (5).

FLETCHER J. This is an application to revoke a sanction that has been granted under section 195 of the Code of Criminal Procedure. The facts appear to be as follows: On September 1st, 1911, a suit brought by Mr. Thaddeus against the applicant was heard before Harington J., who decreed the suit *ex parte*. At the conclusion Mr. Buckland, who appeared for Mr. Thaddeus, according to the Court minute, asked for sanction to prosecute Brojendra Nath Saha, under sections 193, 199 and 200 of the Indian Penal Code, for having made a false affidavit. The Court according to the minute said, "Very well." That suit, as I have already said, was heard on September 1st, 1911; that was on the eve of the long vacation, and the decree was not drawn up till January 6th, 1912. Apparently last year the Court sat for a very few days, owing to

(1) (1872) 7 Mad. H. C. R. 58.

(3) (1896) I. L. R. 18 All. 203.

(2) (1905) I. L. R. 32 Calc. 379.

(4) (1896) 1 C. W. N. 529.

(5) (1906) 11 C. W. N. 119.

1912  
THADDEUS  
v.  
JANAKI  
NATH SAHA.  
FLETCHER J.

the visit of His Majesty the King-Emperor, between the long vacation and the New Year, and the visit of the King-Emperor running into the New Year, according to my recollection, we did not resume work on January 2nd, as we generally do. The decree was filed on January 6th, and an office copy was obtained on January 16th. According to the practice of the Court, sanctions are not embodied in the decree. The office raise difficulties about that, and they refuse to put these other matters into the decree. There having been apparently no formal application before Mr. Justice Harington in the matter, the office refused to draw up the order without formal papers being put in. So, on the 27th May, 1912, a petition was presented to myself, I being then the senior Judge sitting on the Original Side, Harington J. being absent on furlough, asking for the sanction, as to which Harington J. had said, "Very well," on September 1st, 1911. According to the minutes I also said, "Very well", and the order was drawn up, and that is how the matter stands at present. The first question that has been raised is as to whether I had jurisdiction to grant the second sanction. It has been stated, on the authority of the *Queen v. Kristna Rau* (1), that a verbal sanction was enough, and therefore, Mr. Justice Harington's sanction having been granted verbally, I had no jurisdiction to grant the sanction on May 27th, 1912. I cannot depart from what I know is the established practice of the Court, that is, to grant these sanctions only on the formal petition being put in, upon which an order can be passed. That I know is the practice in this Court, and the office raise difficulties in drawing up orders where no formal application is made to the Court. It seems, therefore, I must follow what I know is the established practice of this Court, and hold that



I had jurisdiction to pass the order of May 27th, 1912, when the petition had been placed before the Court. Then it is said that I ought not to have granted sanction because it was so long after September 1st, 1911. Whether, if that point had been called to my attention, that Mr. Thaddeus had been staying his hand between September 1st, 1911, and May 27th, 1912, to apply for his formal order for sanction, I should have given it, I am not now in a position to say. But certainly it does appear to me that is a matter in which the delay should have been explained. However, I made the order, and the order is there, unless I have power and see good grounds for cancelling the same. The first point that has been raised by Mr. Chaudhuri is that I have no power to cancel this order at all, because any application to revoke the sanction ought to be made to the Appellate Bench, and on that point it appears to me that he is supported by the decision in *Kali Kinkar Sett v. Dinobandhu Nandy* (1), which Mr. Norton also relies on, that this Court is not the proper Court to extend time. If I have got no power to extend time under sub-section (6) of section 195 of the Code of Criminal Procedure, I have no power to revoke sanction which has been granted. I think that the two cases stand on exactly the same footing, and the case cited by Mr. Norton, being the decision of Sir Francis Maclean C.J., and Sale and Harington JJ., shows that any application to revoke the sanction, if properly granted, ought to be made to an Appellate Bench. The sanction having been properly granted, I have no jurisdiction to revoke it. Whether some other Court may think that this sanction ought to be revoked, owing to the delay made by Mr. Thaddeus, or for some other reason, it is not for me to say. All that I have to say is that, having properly granted the sanction, I have

1912  
 THADDEUS  
 v.  
 JANAKI  
 NATH SAHA.  
 FLETCHER J.

1912  
 THADDEUS  
 v.  
 JANAKI  
 NATH SAHA.

no power, on the authority of *Kali Kinkar Sett v. Dinobandhu Nandy* (1), to revoke the sanction or to extend the time. That being my opinion, the present Rule must fail and must be discharged with costs.

*Rule discharged.*

Attorneys for the plaintiffs: *Leslie & Hinds.*

Attorney for the defendant, Brojendranath Saha:  
*P. N. Sen.*

H. R. P.

(1) (1905) I. L. R. 32 Cal. 379.

## APPELLATE CIVIL.

*Before Chitty and Teunon JJ.*

1912  
 Dec. 9.

CHEODDITTI

v.

TULSI SINGH.\*

*Suit—Bengal Tenancy Act (VIII) of 1885, ss. 30(b) 37, 105, 107, 109—Whether an application under s. 105 of the Act, a suit—Withdrawal of an application under that section, effect of—Subsequent suit for enhancement of rent under s. 30(b), whether maintainable.*

An application under section 105 of the Bengal Tenancy Act cannot be regarded as a suit.

*Upadhya Thakur v. Persidh Singh* (1) referred to.

Therefore, although an application under section 105 of the Bengal Tenancy Act was previously withdrawn, without liberty to make a fresh application, a subsequent suit for enhancement of rent under s. 30(b) of the Act is maintainable; the provisions of either section 37 or 109 of the Act are not applicable to such a case.

\* Appeal from Appellate Decree, No. 2993 of 1910, against the decree of J. C. Twidell, District Judge of Bhagalpore, dated July 5, 1910, confirming the decree of Paresh Chandra Banerjee, Munsif of Bhagalpore, dated March 19, 1910.

(1) (1896) I. L. R. 23 Cal. 723.

SECOND APPEAL by A. B. Cheodditti, the plaintiff.

1912

CHEODDITTI  
c.  
TULSI SINGH.

This appeal arose out of an action brought by the plaintiff to recover arrears of rent, in which he also claimed enhancement of rent under section 30(b) of the Bengal Tenancy Act. It appeared that the plaintiff previously made an application under s. 105 of the Act for settlement of fair and equitable rent of the defendants. The said application was withdrawn by him, the plaintiff, but no leave was granted to make a fresh application. An appeal was preferred by him to the Special Judge against the order refusing to grant leave, but it was dismissed on the 3rd April, 1907. The present suit was contested by the defendant mainly on the ground that, regard being had to the provisions of sections 37 and 109 of the Bengal Tenancy Act, the claim for enhancement was not maintainable. The Court of first instance gave effect to the contention of the defendants, and disallowed the claim for enhancement, but passed a modified decree in favour of the plaintiff at the admitted rate. On appeal, the decision of the first Court was affirmed by the learned District Judge. Against that decision the plaintiff appealed to the High Court.

*Babu Umakali Mukherjee* (with him *Babu Kulwant Sahay*), for the appellant. Section 105 of the Bengal Tenancy Act relates to application only. Such an application is optional. A landlord may either apply under that section to get the rent of the tenant settled, or sue under section 30(b) of the Act for enhancement of the rent. An application under section 105 cannot be regarded as a suit: see *Upadhya Thakur v. Persidh Singh* (1). Therefore, on withdrawal of an application under that section, without any leave to prefer a fresh application, does not bar a

1912  
CHEODDITTI  
v.  
TULSI SINGH.

subsequent suit for enhancement of rent under section 30(b). Section 373 of the Code of Civil Procedure relates to withdrawal of suits and not of applications. Moreover, the subject-matter of the subsequent suit is different from the subject-matter of the previous application. The application under section 105 having been withdrawn, it could not be said that it had the force of a decree under section 107, nor could it be said that there was a suit which was dismissed on the merits. That being so, the suit was maintainable, and the provisions of sections 37 and 109 of the Bengal Tenancy Act had no application.

*Babu Mohini Mohan Chatterjee*, for the respondent. Section 373 of the Code of Civil Procedure applies to the facts of the present case. Section 107 of the Bengal Tenancy Act makes it clear that the procedure to be adopted by the Revenue officer in all proceedings for the settlement of rent is the same as laid down in the Civil Procedure Code for trial of suits, and the order passed in such proceeding has the force and effect of a decree. Section 373 appears in Part II of the Code, which treats of incidental proceedings in suits; therefore, under section 107 of the Bengal Tenancy Act, section 373 of the Code of Civil Procedure would be applicable to proceedings under section 105 of the Act. Section 373 being applicable, the present suit for enhancement of rent under section 30(b) of the Bengal Tenancy Act is barred, as the previous application under section 105 of the Act was withdrawn without leave to prefer a fresh application. The subject-matter of the previous application, as also of the subsequent suit, is the same. The case cited by the other side is distinguishable. The decision in the case was passed before s. 107 of the Bengal Tenancy Act (VIII of 1885) was amended by Act III of 1898. Withdrawal of an application

under section 105 amounted to a dismissal on the merits. Therefore, regard being had to the provisions of sections 37 and 107 of the Bengal Tenancy Act, present suit of the plaintiff was not maintainable.

1912  
CHODDITTI  
v.  
TULSI SINGH.

*Babu Umakali Mulcherjee*, in reply.

*Cur. adv. vult.*

CHITTY AND TEUNON JJ. This appeal by the plaintiff arises out of a suit for rent in which the plaintiff also claimed enhancement on account of an alleged rise in the price of staple food crops, under section 39 (b) of the Bengal Tenancy Act. The plaintiff obtained a decree for the arrears of rent, but his claim to enhancement was rejected by both Courts on the ground that he had previously preferred an application for the same relief under section 105. It is admitted that an application under section 105 was preferred in 1906. The plaintiff did not, or could not, proceed with it, and accordingly applied for leave to withdraw it. This was allowed, but no leave was reserved to him to prefer a fresh application. He appealed on this point, and his appeal was dismissed on 3rd April, 1907. On 7th January he filed the present suit. In our opinion, an application under section 105 cannot be regarded as a suit. The cases of *Upadhya Thakur v. Persidh Singh* (1) and *Janardhan Misser v. J. Barclay* (Appeal from Order 31 of 1900) (2), decided with reference to section 104 (2) of the Act, as it originally stood, support this view. There does not appear to be any distinction between that and the present section, so far as this point is concerned.

Further, the application under section 105 having been withdrawn, it must be regarded as having been non-existent. There was no order passed under it which could be said to have the force and effect of

(1) (1896) I. L. R. 23 Calc. 723.

(2) Unreported.

1912  
CHEODITTI  
v.  
TULSI SINGH.

a decree under section 107, nor can it be said that there was a suit which was dismissed on the merits. The application under section 105 may have been withdrawn, under the provisions of O. XXIII of the Civil Procedure Code, but that would not convert it into a suit, which would bar a subsequent suit by reason of no leave to file such subsequent suit having been reserved. Moreover, it cannot well be said that the subject-matter of the application made in 1906 and the subject-matter of the suit brought in 1909 are the same.

In the above view of the case, section 37 and section 109 of the Bengal Tenancy Act have no application. The appeal must be allowed, the decrees in both the Courts set aside, and the case remanded to the Court of first instance for a trial on the merits of the plaintiff's claim to enhancement of rent. Cost of this appeal to be costs in the case.

S. C. G.

*Appeal allowed ; case remanded.*

## CRIMINAL REVISION.

*Before Sharfuddin and Cox JJ.*

KARI SINGH

v.

EMPEROR.\*

1912

Dec. 12.

*Defamation—Statement by accused made in application to District Magistrate for transfer of case—Absolute or qualified privilege—English law, applicability of, in the mofussil—Construction of Statutes—Penal Code (Act XLV of 1860) s. 499.*

Section 499 of the Penal Code is exhaustive ; and if a defamatory statement does not fall within the specified Exceptions, it is not privileged.

The English common law doctrine of absolute privilege does not obtain in the mofussil in India.

A defamatory statement made in bad faith by an accused, against whom a trial is pending in a Criminal Court, and contained in a petition to the District Magistrate for a transfer of the case, is not absolutely privileged, but is punishable under s. 499 of the Penal Code.

*Greene v. Delaney* (1), *Angada Ram Shaha v. Nemai Chaud Shaha* (2) and *Kali Nath Gupta v. Gobind Chandra Basu* (3) followed.

*Potaraju Venkata Reddy v. Emperor* (4) dissented from.

*Baboo Gurnesh Dutt Singh v. Mugneeram Choudhry* (5), *Bhikunjer Singh v. Becharam Sircar* (6), *Woolfun Bibi v. Jesarat Sheikh* (7), *Golap Jan v. Bholanath Khetry* (8) distinguished.

*Haidar Ali v. Abdu Mia* (9) referred to.

*Kari Singh v. Emperor* (10) explained.

The proper course in construing an Act is to ascertain the natural meaning of its language, and not to assume that it was intended to leave the existing law unaltered, except when such intention is stated.

\* Criminal Revision, No. 1509 of 1912, against the order of E. G. Drake-Brockman, Sessions Judge of Bhagalpore, dated May 27, 1912.

(1) (1870) 14 W. R. Cr. 27.

(6) (1888) I. L. R. 15 Calc. 264.

(2) (1896) I. L. R. 23 Calc. 867.

(7) (1899) I. L. R. 27 Calc. 262.

(3) (1900) 5 C. W. N. 293.

(8) (1911) I. L. R. 38 Calc. 880.

(4) (1912) 13 Cr. L. J. 275.

(9) (1905) I. L. R. 32 Calc. 756.

(5) (1872) 11 B. L. R. 321.

(10) See *post*, p. 441 (note).

1912  
 KARI SINGH  
 v.  
 EMPEROR.

*Bank of England v. Vagliano* (1) and *Norendra Nath Sircar v. Kamalbasini Dasi* (2) followed.

The essence of a Code is to be exhaustive in the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment, according to its true construction.

*Gokul Mandar v. Pudmanund Singh* (3) followed.

ONE Punai Kundu, a servant of Macpherson, manager of the Bhagawan Factory of Monghyr, instituted a case of rioting against the petitioner and others, which was sent for trial to the Court of Moulvi Najimuddin, an Honorary Magistrate at Beguserai. During the pendency of the case the petitioner filed an application before the District Magistrate of Monghyr for transfer of the same, paragraph (5) of which was as follows :—

"(5) That on the 17th June last, on the date fixed for the hearing of this case, Mr. Macpherson and the manager of the Majhoul Kothi, where some properties of the trying Honorary Magistrate have been leased out, came to the Court of the trying Magistrate and had some private talk with the Honorary Magistrate, and the petitioner apprehends that the manager of the Majhoul Kothi was brought to put additional pressure on the trying Magistrate to induce him to convict the petitioner, and that he cannot get a fair and impartial trial in that Court, or in any other Court in Bengal."

Macpherson, and Finch, the manager of the Majhoul Factory, thereupon lodged separate complaints, under s. 499 of the Penal Code, against the petitioner. The two cases were tried separately by J. E. Mackey, Deputy Magistrate of Monghyr, who convicted the petitioner in each case, on the 21st March, 1912, and sentenced him to a fine of Rs. 100. It was proved at the trial that neither Macpherson nor Finch went to Beguserai on the day in question. Appeals from the convictions and sentences were dismissed, on the 27th May, by the Sessions Judge of Monghyr. The petitioner thereupon moved the High Court against both

(1) [1891] A. C. 107.

(2) (1896) I. L. R. 23 Calc. 563.

(3) (1902) I. L. R. 29 Calc. 707.



orders, but a Rule was issued at first only in the case brought by Finch, the other application standing over pending the disposal of the Rule, which was made absolute on the 11th October, 1912 (1). The petitioner then obtained the present Rule with reference to the case in which Macpherson was the complainant.

1912  
KARI SINGH  
v.  
EMPEROR.

*Babu Amulya Charan Chatterjee*, for the petitioner. Under the English law a witness or a party is absolutely privileged from a civil suit or a criminal prosecution: *Dawkins v. Rokeby* (2), *Royal Aquarium v. Parkinson* (3), *Munster v. Lamb* (4). In India the doctrine has also been applied: *Potaraui Venkata Reddy v. Emperor* (5), *Golap Jan v. Bholanath Khettry* (6), and see the dissenting judgment of Richards J. in *Emperor v. Ganga Prasad* (7). The Indian Codes are not exhaustive: see *In the matter of Stallmann* (8) and *Surendra Nath Banerjee v. Chief Justice* (9). The Criminal law of defamation contained in s. 499 of the Penal Code is imported from the English law on the subject. When the Code departs from such law, it does so in express and unambiguous terms. The exceptions to s. 499 correspond to the five classes of qualified privilege known to the law in England, and mentioned in Odgers' Libel and Slander, 5th ed. 242, Clerk and Lindsell 585, and Halsbury's Laws of England, Vol. XVIII, p. 677. The doctrine of absolute privilege is not referred to in the Penal Code, and the English rule has not been interfered with. Such an important doctrine cannot be taken away by implication: see *In the matter of Stallmann* (10). The remarks of Lord Herschell in *Bank of*

(1) See *post*, p. 441 (note).

(6) (1911) I. L. R. 38 Calc. 880, 888.

(2) (1873) L. R. 8 Q. B. 255, 263.

(7) (1907) I. L. R. 29 All. 685.

(3) [1892] 1 Q. B. 431, 442, 446, 451.

(8) (1911) I. L. R. 39 Calc. 164.

(4) (1883) 11 Q. B. D. 588, 601, 606.

(9) (1883) I. L. R. 10 Calc. 109.

(5) (1912) 13 Cr. L. J. 275, 279.

(10) (1911) I. L. R. 39 Calc. 164, 198.

1912  
KARI SINGH  
v.  
EMPEROR.

*England v. Vagliano* (1) apply to codifications of existing law, and not of new law, as the Criminal law of defamation, which was enacted for the first time by the Penal Code. The principle of absolute privilege was recognized by the Privy Council in *Baboo Gunnesh Dutt Singh v. Mugneeram Chowdhry* (2), and is based on considerations of public policy.

*The Advocate General (Mr. G. H. B. Kenrick, K.C.)*, for the Crown. The accused can only claim the benefit of Excep. (9) to s. 499 of the Penal Code, which does not import any such absolute immunity as is recognized by English law: see Mayne's Criminal Law of India, pp. 903, 905. In *Queen v. Pursoram Dass* (3), defamatory expressions were held not to be privileged under Excep. (9) unless made in good faith. Allegations in an application for transfer, which were untrue, or made without reasonable grounds, were similarly held to be actionable in a civil suit in *Shib-nath Talaputtro v. Sat Cowrie Deb* (4): see also *Chowdhry Goordutt Singh v. Gopal Dass* (5).

The Criminal law of defamation depends on the construction of s. 499, and not the English law, and defamatory statements in a petition presented in a judicial proceeding are not absolutely privileged criminally or civilly: *Greene v. Delaney* (6), *Abdul Hakim v. Tej Chandar Mukarji* (7). In the case of a witness, where a question was put to him, the Bombay High Court held the occasion absolutely privileged: *Nathji Muleshwar v. Lulbhai Ravidat* (8). But the Calcutta High Court dissented from this view in *Augada Ram Shaha v. Nemai Chand Shaha* (9) (as

(1) [1891] A. C. 107.

(2) (1872) 11 B. L. R. 321, 328.

(3) (1865) 3 W. R. Cr. 45.

(4) (1865) 3 W. R. 198.

(5) (1866) 1 Agra H. C. R. 33.

(6) (1870) 14 W. R. Cr. 27.

(7) (1881) I. L. R. 3 All. 815.

(8) (1889) I. L. R. 14 Bom. 97.

(9) (1896) I. L. R. 23 Cal. 867.

to defamatory statements in pleadings), which was followed in a criminal case: *Kali Nath Gupta v. Gobinda Chandra Basu* (1). A witness actuated by malice and making a voluntary and irrelevant statement, not elicited by any question put to him, is not privileged: *Haidar Ali v. Abdu Mia* (2). The remarks of the learned Chief Justice in *Golap Jan v. Bhol math Khettry* (3) are *obiter*.

1912  
KARI SINGH  
v.  
EMPEROR.

*Babu Amulya Charan Chatterjee*, in reply.

SHARFUDDIN AND COXE JJ. The accused in this case has been convicted of defaming one, Mr. Macpherson. It appears that in a former case he applied to the District Magistrate for a transfer, and in that application he stated that Mr. Macpherson had brought to Court the manager of the Majhoul Factory, who was the trying Magistrate's tenant, and had had a private talk with the trying Magistrate. He inferred that this was done to put pressure on the trying Magistrate, and to induce him to convict the petitioner.

It appears that this was all pure invention. The manager of the Majhoul Factory was not brought to Court at all, and Mr. Macpherson had no private talk with the trying Magistrate. The assertion clearly amounted to an accusation against Mr. Macpherson that he had attempted to corrupt justice, and it cannot be gainsaid that it was defamatory, and made in bad faith.

The petitioner has obtained a rule on the Magistrate to show cause why the conviction should not be set aside, on the ground that the statement in the application for transfer was absolutely privileged.

(1) (1900) 5 C. W. N. 293.

(2) (1905) I. L. R. 32 Calc. 756.

(3) (1911) I. L. R. 38 Calc. 880.

1912  
KARI SINGH  
v.  
EMPEROR.

It is evident on reference to the terms of the section itself that statements made in bad faith are not protected. But it is argued by the learned pleader who appears in support of this rule, following the decision in *Potaraju Venkata Reddy v. Emperor* (1), that the English common law doctrine of absolute privilege is also law in this country. Speaking with the utmost respect for that decision, we are unable ourselves to take this view. The learned pleader has not shown us any authority, historical or otherwise, for holding that the English common law ever had any application to the Indian mofussil, and despite some casual expressions, in certain decisions, we are unable to understand how it could ever have had any application. It is argued, however, that as the Exceptions in section 499 of the Penal Code correspond only to the classes of qualified privilege in English law, and as there is no reference in the Penal Code to the cases of absolute privilege, it must be assumed that the framers of the Code, who were introducing the English law into this country, cannot have intended to exclude that portion of it. The rule laid down in *Bank of England v. Vagliano* (2), quoted in *Norendra Nath Sircar v. Kamalbasini Dasi* (3), was that the proper course to adopt in construing an Act was to ascertain the natural meaning of its language, and not to assume that it was intended to leave the existing law unaltered, except when that intention was stated. This decision is distinguished on the ground that Lord Herschell, in laying down that rule, was dealing with an Act codifying the existing law, and not with an Act introducing new law. It seems to us that the distinction tells rather against the appellant than for him. If it is wrong to assume that in codifying

(1) (1912) 13 Cr. L. J. 275.

(2) [1891] A. C. 107.

(3) (1896) 1. L. R. 23 Cal. 563.

existing law the Legislature intended to leave it unaltered, unless that intention is expressly stated, it seems to us that it would be more, and not less, wrong to assume that in introducing a foreign law into a country the Legislature intended to introduce the whole of it, unless the contrary is expressly stated. It was held in *Gokul Mandar v. Pudmanund Singh* (1) that it is "the essence of a Code to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment, according to its true construction." The Penal Code certainly declares the law in respect of defamation. It contains a definition of defamation, and sets out a number of Exceptions. It appears to us that it must be regarded as exhaustive on the point. Section 2 enacts that every person shall be liable to punishment under this Code, and not otherwise, for their acts. If there are a number of Exceptions to the offence of defamation, other than those contained in section 499, it appears to us that an offender must be liable to punishment for defamation otherwise than under the Code. On principle, therefore, it would seem to us that section 499 is exhaustive, and that if a defamatory statement does not come within the specified Exceptions, it is not privileged.

It appears to us also that in Bengal the matter is concluded by authority. The cases of *Greene v. Delannev* (2), *Augada Ram Shaha v. Nemai Chand Shaha* (3), *Kāli Nath Gupta v. Gobinda Chandra Basu* (4) seem to us clear authority for holding that the question of privilege must be decided by the terms of section 499. The decisions of this Court that have been cited on behalf of the appellant are, in our opinion,

(1) (1902) I. L. R. 29 Calc. 707.      (3) (1896) I. L. R. 23 Calc. 867.

(2) (1870) 14 W. R. Cr. 27.

(4) (1900) 5 C. W. N. 293.

1912  
KARI SINGH  
v.  
EMPEROR.

distinguishable. The first case relied on is that of *Baboo Gunnessh Dutt Singh v. Mugneeram Chowdhry* (1). There it was held that, on principles of public policy, a witness cannot be sued for damages in respect of defamatory evidence given by him in a judicial proceeding. But there their Lordships were dealing with a civil suit, and not with a criminal prosecution; and were not considering the effect of section 499 of the Penal Code. This is a real distinction, because, while the law of crimes has been codified and offences have been defined by Statute, the codification of the Law of Torts was abandoned, and actionable wrongs are not defined by Statute. It is likely enough that, if the Law of Torts had been codified, some provisions would have been introduced, such as exists in the Contract Act, by which suits opposed to public policy would have been barred. But this has not been done, and the question, what is or is not an actionable wrong, has to be gathered from case law, and considerations of justice, equity and good conscience, and not from a statutory definition. It is, therefore, possible in such cases to apply principles of the English law which are consonant with justice, equity and good conscience, which would have no application if actionable wrongs had been defined by Statute. Secondly, it is clear that a voluntary statement by an accused is different from a statement made by a witness who is compelled to answer the questions put to him. The distinction may be fine, but it has been recognised and acted upon by this Court. We may refer again to the case of *Kali Nath Gupta v. Gobinda Chandra Basu* (2) quoted above. And in *Haidar Ali v. Abru Mia* (3) the learned Judges refused to extend the privilege even to a witness

(1) (1872) 11 B. L. R. 321.

(2) (1900) 5 C. W. N. 293.

(3) (1905) I. L. R. 32 Cal. 756.

when the statement was not made in answer to a question that the witness was bound to answer, but was volunteered.

In *Bhikumber Singh v. Becharam Sircar* (1), it was held that a statement made by a witness was absolutely privileged. That was a suit for damages and the case goes no further than *Baboo Gunnessh Dutt Singh v. Mugneeram Chowdhry* (2) already discussed. The same may be said of *Woolfun Bibi v. Jesarat Sheikh* (3). In *Golap Jan v. Bholanath Khettry* (4), the statement was made by a complainant and not by a witness, but the privilege was claimed not in a criminal prosecution but in a suit for damages. That also was a case within the original jurisdiction of this Court, where the application of English law might be supported by arguments that would be inapplicable to a case in the mofussil.

It seems to us, therefore, clear, both on principle and authority, that in Bengal there is no absolute privilege for a statement like that now under consideration, when made in bad faith. It has been pressed upon us that, in the analogous case\* brought

(1) (1888) I. L. R. 15 Cal. 264.

(3) (1899) I. L. R. 27 Cal. 262.

(2) (1872) 11 B. L. R. 321.

(4) (1911) I. L. R. 38 Cal. 880.

\* KARI SINGH v. EMPEROR.§

CHITTY AND RICHARDSON JJ. In this case the accused, Kari Singh, who is the petitioner before us, was put on his trial before Maulvi Najimuddin, an Honorary Magistrate, on a charge under section 147 of the Indian Penal Code. In the course of that trial he presented a petition to the District Magistrate of Monghyr for a transfer of the case to another Court, on the ground that he would not get a fair and impartial trial before the Honorary Magistrate. Paragraph (5) of that petition was as follows :—

“ That on the 17th June last, on the date fixed for hearing of this case, Mr. Macpherson and the manager of Majhoul Kothi, where some properties of the trying Honorary Magistrate have been leased out, came to the Court

1912  
KARI SINGH  
v.  
EMPEROR.

1912  
Oct. 11

1912  
KARI SINGH  
v.  
EMPEROR.

by the manager of the Majhoul Factory, a Bench of this Court set aside the conviction, and it has been suggested that we should refer the matter to a Full Bench. But we can only refer to a Full Bench a decision from which we dissent on a point of law, and we do not so dissent from any decision that has been laid before us. In the analogous case the learned Judges expressly declined to lay down any principle of law, and set aside the conviction, because, in view of the two cases cited by them *Potaraju Venkata Reddy v. Emperor* (1) and *Golap Jan v. Bholanath Khettry* (2), the propriety of the conviction was open to serious doubt. But speaking with all respect we are unable to share the doubts of the learned Judges as to what is at present the law on this point in this province.

The Rule is discharged.

*Rule discharged.*

(1) (1912) 13 Cr. L. J. 275.

(2) (1911) I. L. R. 38 Calc. 880.

of the trying Magistrate and had some private talk with the Honorary Magistrate, and the petitioner apprehends that the manager of the Maghoul Kothi was brought to put additional pressure on the trying Magistrate to induce him to convict the petitioner, and that he cannot get a fair and impartial trial in that Court, or in any other Court in Bengal."

The accused was charged under section 499 of the Indian Penal Code with defaming Mr. Macpherson and also the manager of Majhoul Kothi (Mr. Finch), and has been in each case convicted and sentenced to pay a fine of Rs. 100, or in default to undergo 3 months' simple imprisonment. The accused made two applications to this Court in revision, one in each case. For some reason a Rule was issued only in Mr. Finch's case, the question in Mr. Macpherson's case being left over for further consideration until after the disposal of the Rule so issued.

It has been found as a fact that the allegation above set out was untrue to the knowledge of the accused, inasmuch as neither of the gentlemen in fact came to Begusarai on the day alleged, or had any conversation with the trying Magistrate.

The only question before us is whether the statement of the petitioner must be judged only by the provisions of section 499 of the Indian Penal Code, or whether it was absolutely privileged.



The question in its broadest aspect has been the subject of a large number of judicial decisions in the High Courts of India, and in no one of the Courts have such decisions been entirely uniform.

The statement here is not the statement of a person who is a mere witness, or who is a party to a civil suit. It is the statement made by an accused person in the course of his trial upon a criminal charge. In view of the decisions to which we have been referred, that fact may not be without its importance. It certainly makes it pertinent to observe that in the very recent case of *Potaraju Venkata Reddy v. Emperor* (1), not yet reported in the Indian Law Reports, a Full Bench of the Madras High Court, after a careful examination of the authorities, has held that the statement of an accused person in answer to a question by the trying Court is absolutely privileged. In another recent case in this Court, *Golap Jan v. Bholanath Khetry* (2), where the defamatory statement was made in a complaint preferred under the Criminal Procedure Code, the Chief Justice remarked (p. 888), "but even if the complaint to the Magistrate was defamatory, still the complainant was entitled to protection from suit, and this protection is the absolute privilege accorded in the public interest to those who make statements to the Courts in the course of, and in relation to, judicial proceedings." The remark would apply with as great, or even greater, force to a statement made by an accused person.

We have said that the statement here was made in the course of criminal proceedings, but it was not made in the Court of the trying Magistrate by way of answer to the charge. It was made in the Court of the District Magistrate to support an application for transfer. The order we are about to make must not be understood as in any degree implying that we desire to weaken the sense of responsibility which such applications entail. Sometimes they may be justified. Sometimes they may be mere devices for delaying justice. Or again, they may be resorted to because it is thought that the trial Judge or Magistrate has, not improperly, from personal bias or from extraneous information, but on the bench and judicially, as the case proceeded before him, formed, or provisionally formed, an opinion on the merits, favourable or unfavourable, to one side or the other.

The authorities have been examined so often, and with such differing results, that we do not think that it would serve any useful purpose to traverse the same ground again upon this Rule. The controversy is of a character which can only be finally settled by an authoritative ruling of the Privy Council or by the Legislature. We refrain, therefore, from expressing unqualified opinion upon the question of principle involved, and we content ourselves with saying that, in view of the two cases which we have

1912

KARI SINGH  
v.  
EMPEROR.

(1) (1912) 13 Cr. L. J. 275.

(2) (1911) I. L. R. 38 Cal 880.

1912.  
KARI SINGH  
v.  
EMPEROR

specifically cited, the propriety of the conviction is at least open to serious doubt. In that view of the matter, we make the Rule absolute, set aside the conviction and sentence, and direct that the fine, if paid, be refunded.

A Rule in the same terms must be issued in Mr. Macpherson's case.

E. H. M.

*Rule absolute.*

## CRIMINAL REVISION.

*Before Sharfuddin and Coxe JJ.*

1912  
Dec. 12.

BHIM LAL SAH

v.

EMPEROR.\*

*Complaint, dismissal of—Jurisdiction to direct a prosecution in the absence of any judicial proceeding—Order not made independently, but on the suggestion of the District Magistrate—Complaint—Preliminary inquiry without the existence of reasons for doubting its truth—Omission to record reasons—Permission given to accused to cross-examine and adduce defence evidence—Penal Code (Act XLV of 1860), s. 211—Criminal Procedure Code (Act V of 1898), ss. 202 and 476—Practice.*

Where the petitioner's case was disposed of by the acquittal of the accused, on the 1st August, by a Magistrate who did not then take action under s. 476 of the Criminal Procedure Code, but proceedings thereunder were taken, on the 9th August, and an order made, on the 23rd, by another Magistrate, who had then no seisin of the case, and the District Magistrate having expressed a doubt as to the jurisdiction of the latter, and having considered that such order should be passed by the Magistrate who tried the original case, such Magistrate thereupon, purporting to act under s. 476, directed the prosecution of the petitioner, under s. 211 of the Penal Code, on the 16th September :

*Held*, (i) that the order of the 23rd August was without jurisdiction, as there was no judicial proceeding of any kind before the Magistrate who passed it ;

(ii) That the order of the 16th September was bad in law, as the trying Magistrate had not considered it necessary to take action under s. 476,

\* Criminal Revision, No. 1415 of 1912, against the order of A. McGavin, Deputy Magistrate of Purnea, dated Sept. 16, 1912.

when he acquitted the accused in the original case, and did not exercise an independent judicial opinion in passing it a month-and-a-half later, at the instance of the District Magistrate.

There may be cases in which a Court does not think it necessary in the public interest to take action under s. 476 of the Code, and allows the injured person to seek redress by granting sanction, and in such a case it is not necessary that the order should be passed at or near the time of the disposal of the original case.

When a complainant prefers a complaint and supports it by his oath, he is entitled to be believed, unless there is some apparent reason for disbelieving him, and he is entitled to have the persons complained against brought to trial. When there is no reason whatever for disbelieving the truth of the complaint, the Magistrate has no jurisdiction to act under s. 202.

The accused should not be made a party to a proceeding under s. 202, nor allowed to cross-examine the prosecution witnesses, or to adduce evidence for the defence.

*Baidya Nath Singh v. Muspratt* (1) approved.

*Emperor v. Tanuk Lal Chowdhuri* (2) disapproved.

ON the 2nd January, 1912, the petitioner, Bhim Lal Sah, and one Sudan Sah, filed two separate complaints against certain persons, under ss. 342 and 384 of the Penal Code, before Babu Mukutdhari Singh, a Deputy Magistrate temporarily in charge, who passed the following order: "Complainant to prove his case on 18th January, 1912. Accused may cross-examine." No reasons were recorded for distrusting the truth of the complaint, and no local investigation ordered, but notices were issued upon the accused. On the 18th, Mr. Warde Jones resumed office and proceeded with the inquiry. He recorded the evidence of the prosecution witnesses, allowing the accused to cross-examine them, took defence evidence and the written statements of the accused, and, after considering the whole of the case, dismissed the complaint under s. 203 of the Criminal Procedure Code, and drew up proceedings against the petitioner and Sudan Sah

1912

BHIM LAL  
SAH  
v.  
EMPEROR.

1912  
 BHIM LAL  
 SAH  
 v.  
 EMPEROR.

under s. 476 on the 20th February. Against such orders an application was made to the High Court, which ultimately set them aside and directed the accused in both cases to be placed on trial, holding that s. 202 did not authorize the presence of the accused at the inquiry thereunder, nor the cross-examination of the prosecution witnesses, nor the adducing of defence evidence.

The accused were accordingly tried by Mr. McGavin, a Deputy Magistrate, to whom the cases had been transferred, and acquitted on the 1st August. He had previously directed, under s. 476 of the Code, the prosecution of a witness for giving false evidence, and at the conclusion of his judgment he called upon the petitioner and Sudan Sah to show cause why they should not be ordered to pay compensation to each of the accused, but he did not take any action against them under s. 476.

On the 9th August, Mr. Warde Jones, without having seisin of the case at the time, called on the petitioner to show cause against his prosecution under s. 211 of the Penal Code, and made the following order on the 23rd :—

“The matter has already been fully threshed out in the course of a trial in a competent Court, and found false. Previously also, after due inquiry, this complaint was found to be false by me. No further preliminary inquiry is, therefore, now called for under s. 476, Cr. P. C. I accordingly sanction the prosecution of Bhim Lal under s. 211, I. P. C.”

Proceedings were drawn up and submitted to the District Magistrate, who recorded an order on the 5th September 1912, in these terms :—

“I am in doubt whether the order directing a prosecution under s. 476 should be passed by Mr. Warde Jones or by Mr. McGavin. The complaint was heard by Babu Mukutdhari Singh, who was temporarily acting for Mr. Warde Jones. After the hearing of the complaint the case was made over to Mr. McGavin for trial. I think the order should be passed by Mr. McGavin.”

In the meantime, an application for sanction under s. 195 of the Code was filed by the accused in the original case against the petitioner and Sudan Singh, in respect of an offence under s. 211 of the Penal Code. After the date of the order of the District Magistrate Mr. McGavin took up the matter, and passed the following order on the 16th September:—

“*Proceeding under s. 476.*—Whereas Bhim Lal lodged a complaint before Babu Mukutdhari Singh under ss. 342 and 384, I. P. C., which, after trial in Magistrate’s Court, has been found false, I direct that Bhim Lal shall be prosecuted under s. 211....”

The petitioner then moved the High Court and obtained a Rule on the following grounds, as numbered in the petition:—(i) that Mr. Warde Jones had no jurisdiction to pass an order under s. 476; (ii) that the District Magistrate’s order of 5th September was *ultra vires*; (iii) that Mr. McGavin had no jurisdiction to act under s. 476 at the time he passed the order complained of, and (vi) that there is no reasonable chance of a conviction under s. 211 of the Penal Code.

In his explanation, the Magistrate, Mr. Warde Jones, dealt with the above grounds, and asked for guidance as to the proper procedure to be followed under s. 202 of the Code, in connection with which he quoted the following passage from the judgment of Holmwood and Carnduff JJ. in *Emperor v. Tanuk Lal Chowdhuri* (1):—

“That being so, the complainant must be dealt with in the same manner as laid down in the Code; and if the Magistrate in charge, who cannot always be expected to investigate those cases himself, is otherwise engaged, he must transfer it to another Magistrate under Chapter XVI. He must then take the statement on oath of the original complainant before the police, he must hear his evidence under section 202, and, if necessary, he can allow the persons accused, if they choose to appear, to cross-examine, and adduce witnesses to show the falsity of the case.”

1912  
BHIM LAL  
SAH  
v.  
EMPEROR.

1912

BHIM LAL  
SAH  
v.  
EMPEROR.

*Mr. K. N. Chaudhuri* (with him *Babu Manmatha Nath Mukerjee* and *Babu Jyotish Chandra Bhattacharjee*), for the petitioner. The last order under s. 476, made, not at or about the time of the termination of the original case, but a month-and-a-half later, on the suggestion of the District Magistrate, is bad: *Begu Singh v. Emperor* (1). The proceedings of the 23rd August are also without jurisdiction, as the Magistrate had no seisin of the case at the time. The procedure followed in this case, of permitting the accused to cross-examine and produce evidence, is not warranted by s. 202: see *Baidya Nath Singh v. Muspratt* (2).

No one appeared for the Crown or the opposite party.

SHARFUDDIN AND COXE JJ. The petitioner, Bhim Lal Sah, on the 2nd January, 1912, complained against Atraj Singh and others of having committed certain offences. On this the following order was passed: "Complainant to prove his case on 18th January, 1912. Accused may cross-examine." No local investigation was ordered. No reasons were recorded for distrusting the complaint. Indeed, it is difficult to see what reasons there could be. The order was absolutely illegal, and, considering how opposed it is to the plain words of the Code, and how frequently orders of this kind have been condemned, it is very difficult to understand how the Magistrate who passed it could have believed that he was doing what he was entitled to do. The case dragged on till near the end of February, when the complaint was dismissed. The prosecution of Bhim Lal was then ordered under s. 211. The case then seems to have come before this Court, and this Court held that the accused persons

(1) (1907) I. L. R. 34 Calc. 551. (2) (1886) I. L. R. 14 Calc. 141.

should be properly tried, and that until they had been tried the proceedings under s. 211 should be dropped. They were tried and acquitted by Mr. McGavin, Deputy Magistrate, on the 1st August. A week later Mr. Warde Jones, another Deputy Magistrate, called on Bhim Lal to show cause why he should not be prosecuted under s. 211, and, finally, on the 23rd August, directed his prosecution under s. 476 of the Criminal Procedure Code. The District Magistrate, however, hesitated to act on this proceeding, and observed that the order ought to be passed by Mr. McGavin. Thereupon, Mr. McGavin passed the following order on the 16th September: "Petition purporting to show cause against prosecution under s. 211 filed. The cause shown is not good. Draw up proceedings under s. 211 of the Indian Penal Code." The petitioner then obtained this Rule on the District Magistrate to show cause why his prosecution should not be set aside on the first, second, third and sixth grounds mentioned in his petition. The Rule must clearly be made absolute on the third ground. The order of Mr. McGavin purports to have been passed under s. 476 of the Criminal Procedure Code. Now, if he had thought that action ought to be taken under that section, he ought to have passed the order one-and-a-half months before. The fact that he did not do so indicates very strongly that he did not at the time think it necessary, and that the belated order of the 16th September does not represent his independent judicial opinion. As to the order of the 23rd August, it is unnecessary to waste words on it. There was no judicial proceeding of any sort or kind before Mr. Warde Jones, and his order for the prosecution of the petitioner was altogether beyond his jurisdiction.

We are, however, informed that the persons accused by Bhim Lal petitioned for his prosecution,

1912  
BHIM LAL  
SAH  
v.  
EMPEROR.

1912  
BHIM LAL  
SAH  
v.  
EMPEROR.

and we have considered whether Mr. McGavin's order can be treated as one under s. 195 of the Criminal Procedure Code. Clearly there may be cases in which a Court may not think it necessary in the public interest to take action under s. 476, but may be willing to allow the person injured to seek redress. In such a case it is not necessary that the order should be passed at or near the time of the disposal of the original case. But, considering how illegally and unnecessarily Bhim Lal has been harassed in these proceedings, we do not think that his further prosecution should be sanctioned.

The Deputy Magistrate in charge, Mr. Warde Jones, has submitted an explanation, and with reference to this Court's condemnation of the practice of securing the attendance of the accused person, says that it is a "matter of common practice that when cases are inquired into locally under s. 202 of the Criminal Procedure Code by judicial and non-judicial officers, the statements of accused persons and their witnesses are almost always taken ; and inasmuch as s. 202 of the Criminal Procedure Code does not specifically forbid such procedure, and in the present case the accused persons availed themselves of the option given them to cross-examine, put in statements and adduced evidence, I followed the practice." He refers to another decision of this Court in which, in his view, this practice was sanctioned, and asks for guidance.

It may be observed that the Deputy Magistrate appears to be in error in supposing that there was any local investigation under s. 202 in this case, but leaving that aside, we may express our hearty concurrence in the condemnation pronounced by the former Bench on the practice of conducting these preliminary inquiries in the presence of the accused.



The practice of making the accused a party to such proceedings was condemned in *Baidya Nath Singh v. Muspratt* (1), and its futility is obvious. We do not suppose that Magistrates have so little to do that they prefer trying cases twice over, and it is difficult to avoid a feeling of uneasiness lest the object of the practice may not be to harass complainants and deter them from seeking relief in the Criminal Courts.

As regards the case cited by the Deputy Magistrate, we are, with the greatest respect, unable to agree with the view expressed that, in inquiries under s. 202, the accused should be allowed, if necessary, to cross-examine the complainant's witnesses. Or rather, we should say that, in our opinion, it cannot ever be necessary. The expression of this view was not necessary to the decision of that case, and we do not think that it need be referred to a Full Bench.

When a man files a complaint and supports it by his oath, rendering himself liable to prosecution and imprisonment if it is false, he is entitled to be believed, unless there is some apparent reason for disbelieving him; and he is entitled to have the persons, against whom he complains, brought before the Court and tried. In the present case there was at first, at any rate, no reason whatever for distrusting the truth of the complaint, and the case should have been tried without further delay.

E. H. M.

*Rule absolute.*

(1) (1886) I. L. R. 14 Cal. 141.

1912  
 BHIM LAL  
 SAH  
 c.  
 EMPEROR.

## APPELLATE CIVIL.

*Before Stephen and D. Chatterjee JJ.*

1912

Dec. 17.

KAILASH CHANDRA NAG

*v.*

SECRETARY OF STATE FOR INDIA.\*

*Punitive Police—Costs, apportionment of—Police Act (V of 1861 as amended by Act VIII of 1895), ss. 15, cl. (4), 16—District Magistrate, duty of—Amount realized on apportionment made by a Deputy Magistrate, effect of—Secretary of State for India, suit against, if maintainable.*

An apportionment of costs made by a Deputy Magistrate, under s. 15, cl. (4) of the Police Act, for maintenance of a police force, is illegal.

Where, therefore, an apportionment of costs having been made by a Deputy Magistrate, and which, on appeal, having been affirmed by the District Magistrate, the amount of costs assessed was recovered from a person under s. 16 of the Act by distress warrant :—

*Held*, that the amount not being legally realized, a suit for the recovery thereof would lie against the Secretary of State for India in Council.

*Shivabhan v. The Secretary of State for India* (1) referred to.

SECOND APPEAL by Kailash Chandra Nag, the plaintiff.

This appeal arose out of an action brought by the plaintiff against the Secretary of State for India in Council to recover Rs. 131-4 as., being the amount of taxes assessed and costs of distress warrant. The plaintiff's allegation was that, in pursuance of two

\* Appeal from Appellate Decree, No. 1525 of 1910, against the decree of H. Wahnsley, District Judge of Mymensingh, dated Jan. 17, 1910, confirming the decree of Probodh Chandra Roy, Officiating Munsif of Sherpur, dated March 26, 1909.

proclamations dated the 10th August, 1907, by the Government of Eastern Bengal and Assam under the powers conferred on it by the Police Act (V of 1861), some additional police forces were employed in the areas within the jurisdiction of the police-stations of Sherpur and Nalitabari, in the district of Mymensingh, at the cost of the inhabitants thereof; that he was assessed to pay various sums by a Deputy Magistrate, instead of the District Magistrate; that the District Magistrate rejected his (the plaintiff's) objection to the assessment; that subsequently distress warrant having been issued by the Subdivisional Officer of Jamalpore for realization of taxes assessed upon him, he had to pay the aforesaid sum, and hence the suit was brought by him against the Secretary of State for India in Council, after giving notice under section 424 of the Code of Civil Procedure.

The defendant pleaded, *inter alia*, that the assessment made was not illegal and without jurisdiction, and that the suit against him was not maintainable. The Court of first instance gave effect to the contention raised by the defendant, and dismissed the suit.

On appeal, the learned District Judge of Mymensingh affirmed the decision of the first Court. Against this decision the plaintiff appealed to the High Court.

*Babu Ram Charan Mitter*, for the respondent, raised a preliminary objection that no second appeal lay in the case, as the suit out of which the appeal arose was of the nature cognisable by a Court of Small Causes, its value being less than Rs. 500.

*Babu Kishori Lal Sarkar* (with him *Babu Mukund Nath Roy* and *Babu Akhilbandhu Guha*), for the appellant, submitted that such a suit was excepted from the cognisance of a Court of Small Causes under Art. 3 of Sch. II of the Provincial Small Cause Courts Act.

1912

KAILASH  
CHANDRA  
NAG

v.

SECRETARY  
OF STATE  
FOR INDIA.

1912

KAILASH  
CHANDRA  
NAG  
v.  
SECRETARY  
OF STATE  
FOR INDIA.

The suit was maintainable against the Secretary of State for India in Council. By 21 & 22 Vict., c. 106, the Government of India is a corporate body, and the Secretary of State for India in Council stands in the position of the East India Company, against whom any action could be brought by any party; and the question of the "Acts of Sovereign," as stated in the judgment of the lower Court, does not arise.

Under section 15, clause (4) of the Police Act, the assessment and the apportionment must be made by the District Magistrate. In the present case the District Magistrate did not assess; it was a Deputy Magistrate who assessed, and the assessment was consequently illegal. The mere fact that the matter went up on appeal to the District Magistrate, and the appeal was dismissed by him, does not make the assessment valid. [STEPHEN J. If the assessment is illegal, why is the Secretary of State liable?] The Secretary of State has realised the money and, being in possession of money to which he is not entitled, is liable: see *The Secretary of State for India v. Hari Bhanii* (1). The Secretary of State is liable for money improperly received by a public servant acting ostensibly under a statute, in the event of the money finding its way into the Public Fund. Under section 16 of the Police Code the money passes into the Police Fund and therefore to the Public Fund. He relied on 21 & 22 Vict., c. 106, s. 65, and on the cases of *Shivabhajan v. Secretary of State for India* (2) and *Collector of Furreedpore v. Gooroo Doss Roy* (3).

*Babu Ram Charan Mitter*, for the respondent. The assessment was made by a Deputy Magistrate, and it was confirmed, on appeal, by the District Magistrate. This was a substantial compliance with the

(1) (1882) I. L. R. 5 Mad. 273.

(2) (1904) I. L. R. 28 Bom. 314.

(3) (1869) 11 W. R. 425.

requirements of the Act. Had the plaintiff not appealed, the apportionment would have been illegal.

The suit is not maintainable against the Secretary of State. He is not liable for the money realised from the plaintiff. If the money had gone to the coffers of the Secretary of State, he would undoubtedly be liable. In the present case, the money realised was a part of the general Police Fund, and is therefore not a part of the Public Fund. He referred to the case of *Shivabhaian v. Secretary of State for India* (1) in support of his contention.

*Babu Kishori Lal Sarkar*, in reply.

*Cur. adv. vult.*

STEPHEN AND D. CHATTERJEE JJ. The facts of this case, so far as they are material to the decision of the questions before us in second appeal, are as follows:

In August, 1907, the Government of Eastern Bengal and Assam, acting under section 15 of the Police Act 1861 (as amended by the Amendment Act of 1895), declared that from the conduct of the inhabitants of certain parts of the district of Mymensingh it was expedient to increase the number of police in those places. Their number was accordingly increased, and under section 15(4) it became the duty of the District Magistrate to apportion the costs among the inhabitants of the places in question: but the apportionment was, as is admitted by the respondent, made by a Deputy Magistrate. The present appellants appealed to the District Magistrate to alter the apportionment, and he dismissed the appeal, but it is impossible to hold that this amounted to the making of an apportionment by him, under the rather stringent terms of the sub-section in question. After

1912

KAILASH  
CHANDRA  
NAG

v.

SECRETARY  
OF STATE  
FOR INDIA.

1912

KAILASH  
CHANDRA  
NAG  
v.  
SECRETARY  
OF STATE  
FOR INDIA.

the dismissal of the appellant's appeal, the amount assessed on him was recovered, under section 16, by distress, and we must suppose was applied to the maintenance of the police force, as provided in that section.

The first point raised before us is whether the amount of his apportionment was legally realised from the appellant, and, for the reasons we have stated, we must hold that it was not.

A second question then arises whether the Secretary of State was rightly sued. The wrong that the plaintiff alleges he has suffered is that money has been unlawfully taken from him: the remedy he seeks is that it may be restored to him. We must suppose that the money has, at one time at least, been at the disposal of the Local Government, and been applied by its officer according to law. On these facts, the liability to repay the money has been incurred by some one: has it been incurred on account of the Government of India? If it has, the revenues of India are chargeable (21 and 22 Vict., c. 106, s. 42), and the Secretary of State, to whose control the revenues of India are subject, is the right person to be sued (*Id.*, s. 41), and in considering this question we may take the Government of India to be, not the Governor-General in Council, but, to use an older phrase, "the superintendence, direction and control of the country" [*Sivabhaian v. Secretary of State* (1)] which seems to include the Local Government. We are of opinion that we must answer the question we have propounded in the affirmative. It has not been argued before us that the Local Government has power to raise any money which is not under the general control of the Secretary of State, and we are not aware that his liability for money raised under

colour of the law for the benefit of the Local Government has been saved, as it may have been in the case of money levied or received by a Municipal Corporation or a District Board. Consequently, applying the rule laid down in *Sivabhajan v. Secretary of State* (1), the conditions which would afford a principal exemption for the act of an agent have not been excluded, as a principal cannot retain money improperly received for his use by his agent.

The same result may be reached by another road. The money in question in this case was received for the benefit of the Local Government, for it was received to defray the expenses of a police force under its immediate control, according to its disposal. Suits against the Government of India may be instituted against the Secretary of State, under section 416 of the Code of Civil Procedure, 1882, under which this suit was brought, and by section 2 of the same Act the Local Government is included in the expression "the Government of India." If the Local Government is liable, it is therefore correctly sued as the Secretary of State in Council, and we have not been invited to decide any question of liability that may arise between the Secretary of State and the Local Government.

We are, therefore, of opinion that this suit is rightly brought against the Secretary of State, and this appeal is therefore allowed; the judgment of the lower Appellate Court is set aside, and the suit is decreed in favour of the plaintiff, who is entitled to his costs in all the Courts.

S. C. G.

*Appeal allowed.*

(1) (1904) I. L. R. 28 Bom. 314.

1912

KAILASH  
CHANDRA  
NAG  
v.

SECRETARY  
OF STATE  
FOR INDIA.

**FULL BENCH.**

*Beofre Jenkins C.J., Harington, Stephen, Mookerjee and Holmwood JJ.*

MUNSHI MISSER

*v.*

BHIMRAJ RAM.\*

1913

Jan. 14.

*Easement—Flow of water over servient tenement in a definite channel, if necessary for acquiring right of easement.*

The fact that water flows over the surface of the servient tenement without a definite channel for its carriage, cannot prevent the acquisition of an easement.

*Bidhoo Bhusan Palit v. Beny Mulhab Mazumdar* (1) overruled.

THE reference to Full Bench by Doss and Richardson JJ. was as follows:—

“The plaintiffs instituted this suit nominally for the purpose of recovering possession of a strip of land 31 cubits in length and  $1\frac{1}{2}$  cubits in width, but substantially for the purpose of preventing the defendants from exercising in respect of the land certain easements which they claim. Those easements are—(i) to maintain a roof which projects over the land, and to discharge rain water from this roof; (ii) to discharge water into the land through a drain, which ends in a wall standing on the boundary of the defendants' land, contiguous to the land to which the dispute relates.

In the Court of first instance the learned Munsif found that the defendants had acquired these easements, and dismissed the suit.

In the Court of Appeal below the learned District Judge confirmed the Munsif's decree in respect of the over-hanging roof, but as regards the drain he modified the decree and directed that the drain should be closed.

The defendants have appealed to this Court from the decree of the District Judge, so far as it is adverse to them. The plaintiffs have not appealed, and we have therefore to deal only with the second of the two easements claimed.

\* Reference to a Full Bench in Appeal from Appellate Decree, No. 1931 of 1908.



As to that the learned District Judge makes the following observations :--

"But, accepting the case of the defendants in full, I think that the plaintiffs ought to have succeeded in respect of the drain. Three out of the four witnesses of the defendants admit that the water which flows from this drain does not flow in any defined channel; and the fourth witness, who says that it does flow in a channel which it has scoured out, differs from all the other witnesses in saying that he has seen water flowing from the drain within the past year. This is nobody's case, and I do not think his evidence is very trustworthy. In view of the ruling *Bidhoo Bhusan Palit v. Beny Madhab Mazumdar* (1), the defendants cannot have the right to let their water pass in an undefined channel over the land of the plaintiffs. Again, it is very doubtful on the facts whether the defendants succeeded in proving that the right to let the water flow through the plaintiffs' land had been exercised within two years of the suit. In my opinion the suit ought to have been decreed with respect to the drain only."

These observations raise two questions: (i) whether the easement can be acquired under law, and (ii) whether in fact it has been acquired, and is a right which the defendants are entitled to exercise.

As to the first question, we think with great respect that the case of *Bidhoo Bhusan Palit v. Beny Madhab Mazumdar* (1), on which the District Judge relies, is in conflict with earlier cases, and was wrongly decided.

In reference to certain cases to which we were referred at the hearing, we may point out that there is a large distinction between a servient tenement, which has to bear the burden of receiving water discharged from a dominant tenement, and a dominant tenement which, as against the servient tenement, is entitled to the uninterrupted flow of water in a defined artificial channel.

We may refer to the following cases in support of our opinion that there may be an easement of the nature of that here in question:—*Kopil Pooree v. Manick Sahoo* (2), *Imam Ali v. Poresk Mundul* (3), *Bala Bin Keshav Bava v. Maharu* (4).

In view of these cases, we think that the question, whether the case of *Bidhoo Bhusan Palit v. Beny Madhab Mazumdar* (1) was correctly decided, should be considered by a Full Bench. Should the Full Bench agree with us, the case should, we think, be remanded to the lower Appellate Court to be re-heard with reference to the question whether the defendants have, in fact, the right which they claim. In connection

1913

MUNSHI  
MISSER

v.

BHIMRAJ  
RAM.

(1) (1903) 8 C. W. N. 244.

(3) (1882) I. L. R. 8 Calc. 468.

(2) (1873) 20 W. R. 287.

(4) (1895) I. L. R. 20 Bom. 788.

1913  
 —  
 MUNSHI  
 MISSEK  
 v.  
 BHIMRAJ  
 RAM.

with that question we may observe that an easement may be acquired otherwise than under the provisions of the Limitation Act : *Rajrup Koer v. Abul Hossein* (1), *Charu Surnokar v. Dokouri Chunder Thakoor* (2). The difficulty, however, which necessitates this reference, having arisen in an appeal from an appellate decree, the whole appeal must be referred to a Full Bench for disposal under rule 2 of Chapter V of the Rules of the High Court, Appellate Side."

The defendants, Munshi Misser and others, were the appellants, and the plaintiffs, Bhimraj Ram and others, were the respondents in the appeal to the High Court.

*Babu Lakshmee Narayan Singh* (with him *Babu Ganesh Dutt Singh*), for the appellants. My right is one of discharging water on my neighbour's land, irrespective of the channel through which it flows. There may be a right of easement, though there is no defined channel. The water coming out of my premises passed through an artificial drain. The finding is that I enjoyed this right over 20 years.

[JENKINS C.J. But there is no finding as to your enjoyment of right two years before suit.]

Yes, there is none. The point was discussed before the referring Judges.

[JENKINS C.J. But there must be a finding as to enjoyment within two years before suit, and you must also show a lost grant or the origin of your right.]

But we may suppose that the case was under the common law, and not under section 26 of the Limitation Act.

All decided cases are in my favour, the only exception being *Bidhoo Bhusan Palit v. Beny Madhab Mazumdar* (3).

*Babu Umakali Mukherji*, for the respondents, admitted that he could not resist the point of law, and

(1) (1880) I. L. R. 6 Calc. 394. (2) (1882) I. L. R. 8 Calc. 956.

(3) (1903) 8 C. W. N. 244.

referred to Peacock on Easements, pp. 118 and 119, and *Bidhoo Bhusan's case* (1). He submitted that, even if the point were decided against him, the case should be remanded for findings of fact as to the period of enjoyment of the alleged right.

1913  
MUNSHI  
MISSER  
v.  
BHIMRAJ  
RAM.

The judgment of the Court (JENKINS C.J., HARTINGTON, STEPHEN, MOOKERJEE and HOLMWOOD JJ.) was delivered by

JENKINS C.J. The fact that the water flows over the surface of the servient tenement without a definite channel for its carriage cannot prevent the acquisition of an easement. We, therefore, think that the case of *Bidhoo Bhusan Palit v. Beny Madhab Mazumdar* (1) was not correctly decided. We must accordingly remand the case to the lower Appellate Court, in order that it may be determined, *first*, whether a right has been acquired to discharge water into the servient tenement through a drain, which ends in a wall standing on the boundary of the defendants' land, and, *secondly*, whether, having regard to the provisions of section 26 of the Limitation Act, the present suit lies in respect thereof, and to dispose of the case accordingly.

The costs in the High Court, including the costs of the reference, will abide the result.

S. M.

*Case remanded.*

(1) (1903) 8 C. W. N. 244.

**FULL BENCH.**

*Before Jenkins C.J., Harington, Stephen, Mookerjee and Holmwood JJ.*

1913

SHAMBHU NATH SINGH

Jan. 14.

*v.*

SHEO PERSHAD SINGH.\*

*“Landlord’s interest,” meaning of—Bengal Tenancy Act (VIII of 1885)  
s. 148, cl. (h).*

By the term “landlord’s interest” in s. 148, cl. (h), of the Bengal Tenancy Act, is meant the interest of the person entitled to receive the rent from the tenant at the date of the application for the execution of the decree.

THE reference to a Full Bench by Woodroffe and Richardson JJ. was as follows:—

“This second appeal arises out of an application under section 47 of the Code. The judgment-debtor objected to execution, which was disallowed. The appellant is the admitted landlord of a village. He granted a *ticca* of it to certain persons, which expired on the 15th June, 1908. During the pendency of the lease the *ticcadars* obtained a rent decree. This they assigned to the appellant on the 12th June, 1908, three days before the expiration of their *ticca*. On the 22nd September, 1908, the assignee appellant took out execution. The respondent judgment-debtors contended that the appellant was not entitled to execute the decree, by reason of the provisions of section 148 (h) of the Bengal Tenancy Act, which runs as follows:—“Notwithstanding anything contained in section 232 of the Code of Civil Procedure, an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree, unless the landlord’s interest in the land has become, and is, vested in him.” The application for execution was refused by both Courts on the authority of the decision, *Dwarka Nath Sen v. Peari Mohan Sen* (1), and reported in short notes, p. XIX. This case appears to us in point, notwithstanding certain distinctions which are sought to be made, *viz.*, that there the assignment was after, and not before, the expiration of the term of the lease, and

\* Reference to a Full Bench in Appeal from Order No. 469 of 1909.

(1) (1896) 1 C. W. N. 694.

there was a third party. The principle of that decision appears to be that the meaning of the word "landlord" in the phrase "unless the landlord's interest in the land, etc.," has the same limited significance as the term "landlord" in the preceding part of the clause. If this be so, then the word "landlord" in this case refers to the *ticcadars*, and as the *ticcadars'* or assignors' interest had expired, it was not vested in the appellant at the time of his application for execution. On the other hand, the learned pleader for the appellant relies on the decision *Mammotha Nath Mitter v. Rakhal Chandra Tewary* (1) where it was said that the section does not speak of the assignor's interest, but of the landlord's interest. It is contended on behalf of the appellant that the term "landlord" in the phrase cited means the person who at the date of execution is entitled to receive rent from the tenant, in whatsoever way such right may be vested in him, including the present case where the landlord, by the execution of the *ticca*, divested himself of the right to collect rent, which again became vested in him on the expiration of the *ticca*. This appears to us to be a reasonable view of the section, and to meet its policy which was, as we conceive it, to secure that strangers to the land should not be allowed to speculate in decrees for rent, and possibly harass the tenant, and that the only person who could execute was the person who, at the time of execution, was entitled by reason of a vested landlord's interest, to demand rent. The later decision sought to distinguish the authority on which the lower Courts have relied, on the ground that the determination of a lease for a term was different in its legal consequences from the purchase of a permanent tenure such as a *putni* and the annulment of a *darputni*. We are unable, however, to draw any distinction of principle between this and the earlier case, which appears to us to proceed on the ground that the landlord's interest in section 148 (h) means only the assignor or decree-holder's interest. We, therefore, refer to the Full Bench the question :—

Whether, by the term "landlord's interest," in section 148 (h) of the Bengal Tenancy Act, is meant only the assignor or decree-holder's interest, or the interest of a person entitled to receive rent from the tenant at the date of execution of the decree."

*Babu Jogesh Chandra Ray* (with him *Babu Biraj Mohan Majumdar*), for the appellant. My contention is that only the person entitled to receive rent from the tenant can execute the decree. That is the policy of law. The word "landlord" is defined in the Bengal Tenancy Act. The case of *Dwarka Nath Sen v. Peari*

1913

SHAMBHU  
NATH  
SINGH  
v.  
SHRO  
PERSHAD  
SINGH.

1913

SHAMBHU  
NATH  
SINGH  
v.  
SHEO  
PERSHAD  
SINGH.

*Mohan Sen* (1) is not really applicable. In that case the landlord's interest was transferred to three persons—two being landlords and one a stranger. All three jointly applied for execution. The question might arise whether such a joint application was competent. *Manurattan Nath v. Hari Nath Das* (2) may throw some light on this point. The case of *Manmotha Nath Mitter v. Rakhal Chandra Tewary* (3) is correct in principle.

*Mr. S. A. A. Asghur* (with him *Babu Sarada Prasanna Ray* and *Maulvi Muhammad Yusuff*), for the respondents. It is no question of convenience. The exact construction of the section is to be considered. The interest of a particular individual is in question in section 148 (*h*). By the term "landlord's interest" is meant the interest of the person who assigns. If *A* assigns his interest to *B* for a term, and *B*'s interest expires, *C* (the tenant) is not a tenant of *A* after *B*'s term expired.

[HOLMWOOD J. Whose tenant is he then?]

Section 148 (*h*) is clear. In this case, only the decree was assigned.

[JENKINS C.J. But his interest also expired.]

The judgment of the Court (JENKINS C.J., HARRINGTON, STEPHEN, MOOKERJEE AND HOLMWOOD JJ.) was delivered by

JENKINS C.J. We are of opinion that by the term "landlord's interest" in section 148, clause (*h*) of the Bengal Tenancy Act is meant the interest of the person entitled to receive the rent from the tenant at the date of the application for the execution of the decree. The result is that the appeal is allowed, and the execution will proceed in the usual way.

(1) (1896) 1 C. W. N. 694.

(2) (1904) 1 C. L. J. 500.

(3) (1909) 14 C. W. N. 752.

The appellants are entitled to the costs of this Court, including the costs of this reference and the costs in the lower Appellate Court.

S. M.

*Appeal allowed.*

1913  
 SHAMBHU  
 NATH  
 SINGH  
 v.  
 SHEO  
 PERSHAD  
 SINGH.

## CRIMINAL REVISION.

*Before Sharfuddin and Coxe J.*

PHANINDAR SINGH

*v.*

EMPEROR.\*

1913  
 Jan. 10.

*Collector—Jurisdiction—Complaint to Collector of the District under s. 58(3) of the Bengal Tenancy Act (VIII of 1885)—Transfer of inquiry to Subdivisional Officer for disposal—Deputy Collector—Jurisdiction of Subdivisional Officer to hold such inquiry and to direct a prosecution for fabrication of false evidence—Bengal Tenancy Act, ss. 3(16), 58(3)—Government Notification of 19th September, 1910—Reg. IX of 1833 ss. 20 and 21—Criminal Procedure Code (Act V of 1898) s. 476.*

Under s. 3(16) of the Bengal Tenancy Act, and Government Notification of the 19th September, 1910, a Subdivisional Officer is a "Collector" and is authorized to hold an inquiry under s. 58 (3) of the Bengal Tenancy Act.

A Collector of the district has power, on complaint made to him, to transfer such inquiry for disposal to a Subdivisional Officer who is, under ss. 20 and 21 of Reg. IX of 1833, subordinate to the Collector, and is required to perform all the duties assigned to him by that functionary.

Where, therefore, a complaint under s. 58 (3) of the Bengal Tenancy Act was made to the Collector of the district, and transferred by him for disposal to the Subdivisional Officer, who found that certain rent receipt books, filed in the course of the inquiry, had been fabricated:—

*Held*, that the latter had jurisdiction, under s. 476 of the Criminal Procedure Code, to direct a prosecution of the offenders for offences under ss. 193 and 196 of the Penal Code.

\* Criminal Revision No. 1609 of 1912, against the order of A. R. Toplis, Subdivisional Officer of Barh, dated Oct. 14, 1912.

1913

PHANINDAR  
SINGH  
v.  
EMPEROR.

THE facts of the case were as follows. On 3rd July 1912 one, Rucktoo Singh, instituted a complaint under s. 58(3) of the Bengal Tenancy Act before the Collector of Patna, stating that he was a tenant of mauza Mahomed Sayadpore, belonging to Sheo Prokash Singh, Chander Prosad Singh and others, that he had sent the zemindars his rent by a money order which they had refused to receive, whereupon he had deposited the amount in the Treasury, and that they had not granted him a receipt but had, nevertheless, brought rent suits against him. Rucktoo Singh also alleged that the zemindars had granted *kutchra* receipts to tenants. On 25th July, the Collector issued notices on the petitioner, Phanindar Singh, and 12 other zemindars, calling upon them to show cause why they should not be fined Rs. 50 under s. 58(3) of the Bengal Tenancy Act. The petitioner and the others showed cause, and denied the transmission of the rent by money order and its deposit in the Treasury. On the 16th August, the Collector transferred the case to the Subdivisional Officer of Barh for disposal. The latter held an inquiry and took evidence on both sides. It appeared that, on the 2nd October, 1912, in the course of such inquiry, eight counterfoil receipt books were put in, on behalf of Bhagwan Sahai, the agent of the zemindars, to prove the issue of regular rent receipts. On the 14th October, the Magistrate concluded the inquiry, and convicted the petitioner Phanindar and the other zemindars, under s. 58(3) of the Bengal Tenancy Act, and fined them Rs. 10 each, holding that they had failed to deliver proper rent receipts to the complainant and other tenants without reasonable cause, and that, after the institution of the present proceedings, Bhagwan Sahai and Phanindar had the receipt books manufactured, and receipts for the past four years distributed to such tenants as agreed to take them. On the same day



the Magistrate issued notices on Bhagwan and Phanindar, under s. 476 of the Criminal Procedure Code, to show cause why they should not be prosecuted, under ss. 193 and 196 of the Penal Code, for intentionally fabricating false evidence. They showed cause on the 29th, but proceedings under s. 476 of the Criminal Procedure Code were drawn up against them. The petitioners thereupon moved the High Court, and obtained the present Rule to set aside the order directing their prosecution as *ultra vires*. The District Magistrate, in his explanation, referred to Government Notification No. 1579T.R., dated 19th September, 1910, published in the *Calcutta Gazette*, Part I, p. 1323, which was as follows :—

“In exercise of the powers conferred by clause 16 of s. 3 of the Bengal Tenancy Act, the Lieutenant Governor is pleased to appoint all officers in charge of subdivisions in which s. 58 of that Act is in force to discharge, in their respective subdivisions, the functions of a Collector under the said section 58.”

*Mr. S. P. Sinha* and *Babu Dwarka Nath Mitter*,  
for the petitioners.

*Mr. P. L. Roy* and *Babu Ambicapada Chowdhry*,  
for the opposite party.

SHARFUDDIN AND COXE JJ. This is a Rule calling on the Collector of Patna and also on the opposite party to show cause why the order passed by the Subdivisional Officer of Barh, on the 29th October, 1912, directing proceedings to be drawn up against the petitioner, under section 476 of the Criminal Procedure Code, should not be set aside, on the ground that it was passed without jurisdiction.

It appears that, on a complaint by one Rucktoo Singh, a proceeding was instituted against the petitioner under clause (3) of section 58 of the Bengal Tenancy Act. The Collector of Patna transferred the case to the Subdivisional Officer of Barh. This officer

1913  
PHANINDAR  
SINGH  
v.  
EMPEROR.

1913  
PHANINDAR  
SINGH  
v.  
EMPEROR.

passed an order on the 14th October, 1912. During the pendency of the proceedings before the Subdivisional Officer two other applications were made by two other tenants, similar to the one made by Rucktoo Singh; and Rucktoo Singh also put in another before this officer: whereupon an order was passed to this effect:—"Notice has already been served. File." During the proceedings under section 58 the petitioner put in a number of counterfoils, in order to show that he had, as a matter of fact, on receipt of rent from the tenants, made over to them printed receipts. The Subdivisional Officer came to the conclusion that these counterfoils were forged documents; and he thereupon recorded a proceeding, on the 14th October, 1912, under section 476 of the Criminal Procedure Code, for the prosecution of the petitioner under section 193 of the Indian Penal Code.

An application was made to this Court, on the ground that this order for prosecution was *ultra vires*, inasmuch as the Subdivisional Officer had no jurisdiction in the matter, and it was also pointed out that the Collector of Patna had no jurisdiction to transfer the enquiry into the complaint of Rucktoo Singh to the Subdivisional Officer of Barh; thereupon this Rule was issued.

The contention on behalf of the petitioner is that section 58 of the Bengal Tenancy Act refers to the powers given to the Collector for the purpose of an enquiry under that section, and that the Subdivisional Officer was not a Collector. Then it is also contended that, even supposing that all Subdivisional Officers are Collectors, the Collector of the district had no power to transfer an enquiry, under section 58 of the Bengal Tenancy Act, to another officer who had the powers of a Collector; our attention has been drawn to clause (16) of section 3 of the Bengal Tenancy Act,

which defines the word "Collector." According to that clause a "Collector" means a Collector of a district, or any other person appointed by the Local Government to discharge any of the functions of a Collector under this Act. And it is contended that the Collector of a district is, no doubt, a Collector under this definition, and that any other officer would become a Collector if appointed by the Local Government to discharge any of the functions of a Collector.

The learned District Magistrate has submitted to this Court an explanation. In it he refers to Government Notification No. 1579T. R., dated the 19th September, 1910 and published at Part I, page 1323, of the *Calcutta Gazette* of the 28th *idem*; and he points out that under this notification all Subdivisional Officers are authorised to discharge, in their respective subdivisions, the functions of a Collector under section 58 of the Bengal Tenancy Act. So there can be no doubt that Subdivisional Officers under this notification are also Collectors.

We now proceed to deal with the question whether the Collector of Patna had any jurisdiction to transfer the inquiry under section 58 of the Bengal Tenancy Act to the Subdivisional Officer of Barh, who was also, under the above notification, a Collector. Under section 20 of Regulation IX of 1833 it is provided that a Deputy Collector appointed under this Regulation should be, in all respects, subordinate to the Collector under whom he may be placed, and is required to perform all duties assigned to him by that functionary. Under section 21 it is in the discretion of the Collector to employ them generally in the transaction of any part of the duties of a Collector.

A Subdivisional Officer is none the less a Deputy Collector because he is specially authorised to perform certain functions of a Collector, and a Collector, in our

1913  
PHANINDAR  
SINGH  
"."  
EMPEROR

1913  
 PHANINDAR  
 SINGH  
 v.  
 EMPEROR.

opinion, is authorised to transfer to him Collectorate work which he has power to perform, though having regard to the wording of the Tenancy Act, it may well be that an enquiry under section 58 would not be transferred to him, if he were not specially authorised to perform the functions of a Collector. We think, therefore, that the action of the Subdivisional Officer was within his powers. For these reasons the present Rule is discharged.

E. H. M.

*Rule discharged.*

## CRIMINAL REVISION,

*Before Sharfuddin and Richardson JJ.*

1913  
 Jan. 29.

LEAKAT HOSSEIN

v.

EMPEROR.\*

*Procession—Commissioner of Police—Orders prohibiting a public procession and a particular individual from joining it—Legality of such orders—Public notice of order, necessity of—Power of Indian Legislature to make police regulations regarding public processions—Calcutta Police Act (Beng. IV of 1866) ss. 62A (4), 102A—Calcutta Suburban Police Act (Beng. II of 1866) ss. 39A (4), 49A—Calcutta and Suburban Police (Amendment) Act (Beng. III of 1910) ss. 16 and 31.*

Sub-section (4) of s. 62A of the Calcutta Police Act, and of s. 39A of the Suburban Police Act, must be strictly construed. It empowers the Commissioner of Police, when he considers it necessary to do so for the preservation of the public peace or public safety, to prohibit a procession or public assembly, but not a particular individual from taking part in the same.

\* Criminal Revision No. 1613 of 1912 against the order of D. Swinhoe, Chief Presidency Magistrate, Calcutta, dated Sept. 24, 1912.

The sub-section does not require any public notice of an order passed thereunder to be given, within the meaning of ss. 102A of the Calcutta and 49A of the Suburban Police Acts.

*Semle*: Indian Legislature is competent to make police regulations of the kind in the interests of the public peace and safety.

1913

LEAKAT  
HOSSEIN"  
EMPEROR.

THE petitioner, who professed to be a *swadeshi* preacher, was tried by the Chief Presidency Magistrate under the Calcutta Police Act (Beng. IV of 1866), s. 62A (6), as added by the Calcutta and Suburban Police Amendment Act (Beng. III of 1910), s. 16, and convicted and sentenced thereunder, on the 24th September, 1912, to a fine of Rs. 100. It appeared that, on the 3rd August 1912, the petitioner sent a copy of a printed notice to Sub-Inspector S. C. Mitter, containing an invitation to the public to take part in two meetings and processions proposed to be held on the 7th. Thereupon, on the 4th, the Commissioner of Police, purporting to act under the Calcutta and Suburban Police Acts, passed an order, in the terms set out in the judgment of the High Court, prohibiting the petitioner by name from having any concern with any procession or public assembly convened for the 7th, and a further order directing the petitioner to comply with the same. The two orders were served personally on the petitioner at his house, but he replied by a notice to Sub-Inspector N. N. Mozumdar declining obedience to them. On the 5th, the Commissioner of Police issued a fresh order, under the same Acts, prohibiting any procession or public assembly on the 7th in connection with "Boycott" day. On that date the petitioner collected an assembly and was leading it in Cornwallis Street, at about 7 A. M., when Inspector N. N. Bose met it, and after questioning the petitioner as to his disobedience of the orders of the 4th, showed him the order made by the Commissioner of Police on the 5th, and asked

1913

LEAKAT  
HOSSEINv.  
EMPEROR.

him to disperse the crowd, but the petitioner refused to do so; and at his call the processionists shouted out "*Bande Mataram*." The procession was dispersed by the police, and the petitioner was arrested but released immediately on executing a bond. Shortly after, he re-formed the assembly and led it to Sukea Street where it was stopped and dispersed by the police. The petitioner was prosecuted and convicted as stated above, and he thereupon moved the High Court and obtained the present Rule.

*Mr. N. C. Sen* and *Babu Narendra Nath Set*, for the petitioner.

*The Standing Counsel (Mr. B. C. Mitter)*, for the Crown.

SHARFUDDIN AND RICHARDSON JJ. This Rule was issued upon the Chief Presidency Magistrate to show cause why the conviction of the petitioner and the sentence passed upon him should not be set aside, on the ground that the order of the Commissioner of Police, dated the 4th August, 1912, does not come within the scope of clause (4) of section 62A of the Calcutta Police Act (Beng. IV of 1866), and clause (4) of section 39A of the Calcutta Suburban Police Act (Beng. II of 1866). The two sections are in identical terms, and were inserted in the Acts referred to by the Calcutta and Suburban Police (Amendment) Act (Beng. III of 1910).

Clause (4) runs as follows:—"The Commissioner of Police may also, by order in writing, prohibit any procession or public assembly, whenever and for so long as he considers such prohibition to be necessary for the preservation of the public peace or public safety: Provided that no such prohibition shall remain in force for more than seven days without the sanction of the Lieutenant-Governor."

The facts of the case are these. The petitioner, Leakat Hossein, describes himself as a *swadeshi* preacher. He says that since some time in 1905 he has led hundreds of processions in Calcutta and elsewhere in furtherance of the *swadeshi* movement. On the 3rd August, 1912, Sub-Inspector S. C. Mitter received a printed notice from the petitioner, being a copy of a notice which he had published, or was intending to publish, inviting the public to take part in two processions and meetings on the 7th August. On the 4th August, the Commissioner of Police passed the following order:—

“Whereas it appears to the Commissioner of Police that it is necessary for the preservation of the public peace that he should prohibit any procession or public assembly in which you, Leakat Hossein, have or may have any concern whatsoever, on the 7th of August, 1912, within the Town and Suburbs of Calcutta, the Commissioner of Police, in pursuance of the provisions of section 62A, clause (4), of Act IV of 1866 (B.C.), and section 39A, clause (4), of Act II of 1866 (B.C.), as modified up to the 1st June 1910, hereby prohibits you, the said Leakat Hossein, from having any concern whatsoever with any procession or any public assembly on the 7th day of August, 1912, within the limits of the Town and Suburbs of Calcutta.”

On the same day, *i.e.*, 4th August, 1912, the Commissioner of Police passed a further order requiring the said Leakat Hossein to comply with the order above set out.

The two orders were, admittedly, served on Leakat Hossein personally.

On the 5th August, the Commissioner of Police passed a third order to the following effect:—

“Whereas it appears to the Commissioner of Police, Calcutta, that it is necessary for the preservation of the public peace or the public safety that he should prohibit any procession or public assembly which has any reference to the boycott movement or the subject of the boycott of foreign or imported goods, or which has any reference to the celebration of what is known as the boycott day, the Commissioner of Police, in pursuance of the provisions of section 62A, clause (4), of Act IV of 1866 (B.C.), and

1913  
LEAKAT  
HOSSEIN  
v.  
EMPEROR.

1913

LEAKAT  
HOSSEIN  
v.  
EMPEROR.

section 39A, clause (4), of Act II of 1866 (B.C.), as modified up to the first June, 1910, hereby prohibits any procession or public assembly on the 7th day of August, 1912, within the limits of the Town and the Suburbs of Calcutta, which has any reference whatsoever to the boycott movement or the subject of the boycott of foreign or imported goods, or which has any reference whatsoever to the celebration of what is known as the boycott day, on the 7th of August, 1912."

It is not disputed that the petitioner received this order on the 7th August, when he was leading the first of the processions formed by him that day.

Previously to the 7th August, the petitioner had expressed his intention to disregard the Commissioner's orders of the 4th August, on the ground that they were illegal.

On the 7th, the petitioner was leading a procession along Cornwallis Street, at about 7 A. M., and what happened is thus described by the Magistrate:—

"Inspector N. N. Bose met the procession, and went up to accused and told him that he had been served with a notice from the Commissioner prohibiting him from taking out a procession, and asked accused why he had done so. Accused said the orders served on him were illegal, and he refused to disperse the procession. The Inspector asked him to disperse it, and showed him another order of the Commissioner, Exhibit 3, prohibiting any procession on 7th August which had any reference to the boycott movement. This document was explained to accused. Accused asked one of his followers, Upendra Nath Chowdhury, to read it to him. Upendra explained it to the accused and signed it, but the accused refused to sign it. About this time the Deputy Commissioner, Mr. Lowman, with Inspector Mulcahy, came up. The processionists shouted out "*Bande Mataram*" at the call of the accused. The accused was arrested, and the procession dispersed. The accused was immediately released on signing a bond. Shortly after, the accused again formed the procession, and led it down the street with banners flying till it reached Sukea Street, where it was stopped and dispersed by Inspector Fazal."

On these facts, the petitioner has been convicted under sub-clause (ii) of clause (6) of section 62A of the Calcutta Act, and sentenced to pay a fine of Rs. 100,



or in default to suffer rigorous imprisonment for one month.

It is contended for the petitioner that the Commissioner's orders of the 4th August were illegal, because they were addressed to the petitioner personally, and are not orders within the scope of clause (4). That clause, it is argued, enables the Commissioner of Police, when he considers it necessary for the preservation of the public peace and the public safety, to prohibit a procession or public assembly, but does not enable him to forbid individuals to join any procession or public assembly which may be formed or held. In our view, there is reason and force in that argument. A power, such as is conferred by clause (4), must be exercised strictly according to the terms of the statute. It is one thing to say that a procession will not be allowed, and quite another thing to say that, if a procession is formed, particular individuals are not to join therein. We are of opinion that the law does not give the Commissioner power to discriminate between individuals in this way. It was suggested by the learned Standing Counsel for the Crown that the Commissioner might prohibit a procession in which a certain person should take part, if he considered that the presence of such person would be dangerous to the public peace or safety. Assuming it to be so, it was not what the Commissioner did. If regard be had only to his orders of the 4th August, no member of the processions formed on the 7th August disobeyed these orders, except the petitioner. The processions were not prohibited, but the petitioner was prohibited from taking part in them.

Whatever may be said, however, as to the orders of the 4th August and the first of the two processions which took place on the 7th August, we are clearly of opinion that, in forming and leading the second

1913

LEAKAT  
HOSSEIN  
v.  
EMPEROR.

1913

LEAKAT  
HOSSEIN  
v.  
EMPEROR

procession the petitioner disobeyed the Commissioner's order of the 5th August, a perfectly good and valid order, and in so doing committed the offence of which he has been convicted.

As to the suggestion that public notice of the order of the 5th August should have been given, in the manner provided by section 102A of the Calcutta Act, and section 49A of the Suburban Act, these sections only lay down the procedure to be followed when public notice is required to be given by some other provision in the respective Acts. The clause now in question requires that an order made thereunder should be in writing, but does not require that public notice should be given of it. As we have mentioned, it is not disputed that the order of the 5th August was brought to the petitioner's knowledge.

It was further suggested that the clause in question is *ultra vires* of the Indian Legislatures. The Rule was not issued on this ground, which was not fully argued. We may say, however, that we see no reason to doubt that the Indian Legislatures are competent to make police regulations of this kind in the interests of the public peace and safety.

The result is, that the Rule must be discharged.

E. H. M.

*Rule discharged.*

**FULL BENCH.**

*Before Jenkins, C.J., Harington, Stephen, Mookerjee and Holmwood JJ.*

EMPEROR

v.

HAR PRASAD DAS.\*

1913

Feb. 4.

*High Court, Jurisdiction of—Order under s. 476 of the Criminal Procedure Code by Settlement Officer—Whether civil appellate or criminal appellate side can revise—Criminal Procedure Code (Act V of 1898) ss. 439, 476—Civil Procedure Code (Act V of 1908), s. 115—High Courts Act (24 & 25 Vict c. 104), ss. 14 and 15.*

In the case of an order passed by a Civil or Revenue Court under s. 476 of the Criminal Procedure Code,—

- (i) S. 439 of the Criminal Procedure Code has no application ;
- (ii) The High Court can exercise the powers vested in it by s. 115 of the Civil Procedure Code or s. 15 of the High Courts Act ; and
- (iii) The Bench of the High Court exercising criminal jurisdiction cannot, as such, deal with the matter on revision, but the Judges composing that Bench may do so, if authorised by the Chief Justice under s. 14 of the High Courts Act.

*Kali Prosad Chatterjee v. Bhuban Mohini Dasi* (1) and *Emperor v. Gopal Barik* (2) considered and approved of to a certain extent.

THIS Reference to Full Bench arose out of an application under section 439 of the Criminal Procedure Code and section 15 of the Charter Act made by Har Prasad Das, the accused.

In 1911, survey and settlement proceedings were instituted in respect of a village in Shahabad owned by the said Har Prasad Das. At the time of the attestation in the settlement proceedings there were disputes between Har Prasad Das and his tenants regarding the rate of rent and other matters. Har Prasad's

\* Reference to Full Bench in Criminal Revision No. 631 of 1912.

(1) (1903) 8 C. W. N. 73.

(2) (1906) I. L. R. 34 Calc. 42.

1913

EMPEROR  
v.  
HAR PRASAD  
DAS.

agents thereupon filed before the Assistant Settlement Officer *jamabandis* and other papers for 2 years. The tenants denied the genuineness of the papers filed. The Assistant Settlement Officer enquired into the matter and found the papers to be forged and ordered proceedings to be drawn up under section 476 of the Criminal Procedure Code against Har Prasad and another and they were directed to show cause why they should not be prosecuted for abetment of offences under sections 467 and 471 of the Indian Penal Code. Later on, proceedings against Har Prasad were modified and a new proceeding drawn up. Har Prasad showed cause, but the Assistant Settlement Officer disbelieved him and ordered a prosecution under the amended charges. Thereupon, the Magistrate took cognizance of the case, and after hearing the accused, issued summons against him and instituted criminal proceedings.

The accused moved the High Court in its Criminal Revisional Jurisdiction under section 439 of the Criminal Procedure Code and section 15 of the Charter Act.

A Rule was issued and at the hearing of the Rule, Holmwood and Imam JJ. referred the matter to a Full Bench.

The Order of Reference was as follows :—

HOLMWOOD J. The question has arisen on a rule issued by us to show cause why an order made under section 476, Criminal Procedure Code, by the Assistant Settlement Officer in the Shahabad district should not be set aside, whether the Criminal Bench has jurisdiction to interfere with the orders of Civil and Revenue Courts made under that section. The rulings are very conflicting on the point and it seems necessary to have the matter settled by a Full Bench. The difficulty has been got over on more than one occasion by the appointment of a Special Bench by the Chief Justice to hear such applications, but it is obvious that this causes unnecessary delay and embarrassment to applicants, and there seems to be no reason why the matter should not be settled once for all.

1913

EMPEROR  
v.  
HAR PRASAD  
DAS.

Our own view of the matter in a recent case was that there was no question as regards the jurisdiction of the High Court in sanctions under section 195. There it is expressly laid down that any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate, and in the case of an Assistant Settlement Officer the Special Judge would in the first instance deal with the matter, and in the event of its going further, the Civil Bench of the group to which the case belonged. It is the settled practice in this Court to treat cases under section 195 by way of appeal, and no question as to the revisional powers of the Court or the powers under the Charter arises.

But under section 476 the matter is on a wholly different footing. To begin with there is a conflict whether the High Court in dealing with orders under section 476 acts under its revisional powers by virtue of section 439 or whether it only interferes under section 15 of the Charter. The most recent practice has been to discourage references from District Judges, on the ground that such orders could not be dealt with in revision, and District Judges have uniformly refused to refer such questions to us and have directed the aggrieved party to move this Court direct.

In a recent case a Civil Bench of this Court issued a rule against an order under section 476 and directed the party to move the Criminal Bench for stay of criminal proceedings in the Magistrate's Court. This appeared to us to be the proper and reasonable procedure, assuming, as we did assume, for the purposes of that case, that this Court could only interfere with the Civil Court's order under the Charter or under section 115, Civil Procedure Code. The rulings of this Court to which we desire to draw attention are :—

The case of *Kali Prosad Chatterjee v. Bhuvan Mohini Dasi* (1), where it was held by Rampini and Handley JJ. that the Criminal Bench of the High Court has no authority to interfere under section 439, Criminal Procedure Code, with the proceedings of a Munsif taken under section 476, Criminal Procedure Code. The Civil Bench should be moved under section 622 (now section 115) of the Civil Procedure Code.

In taking this view the Judges no doubt relied on the cases of *Eranholi Athan v. King-Emperor* (2) and *In re Chennanagoud* (3); and the former case has since been overruled by a Full Bench of the Madras Court, in the case of *Ottupura Naryanan Somayajipad v. Emperor* (4). The latter case of *In Chennanagoud* (3) was a case under section 195 and still holds good.

It was argued by Mr. Jackson for the petitioner that the Full Bench decision of the Madras Court in *Eranholi's* case (2) having been overruled

(1) (1903) 8 C. W. N. 73.

(3) (1902) I. L. R. 26 Mad. 139.

(2) (1902) I. L. R. 26 Mad. 98.

(4) (1909) I. L. R. 33 Mad. 48.





1913  
 —  
 EMPEROR  
 v.  
 HAR PRASAD  
 DAS.

Charter and not under section 439. It therefore establishes the principle laid down by Stanley C. J. that sections 435 to 439 must be read together and cannot be separated. The words "any proceeding" occur in section 435, exactly as they do in 439, and the exclusion of Chapter XII and certain other sections in section 435 seems to exclude them equally from the operation of section 439. In the sections as regards contempt of Court which immediately follow, Civil and Revenue Courts are given distinct criminal powers. Yet it is enacted that the appeal lies to the Court to which decrees or orders made in such Court are ordinarily appealable. Further it is said that the provisions of Ch. XXXI, that is, the chapter on appeals, shall apply so far as they are applicable to appeals under section 486, but the law is silent as to revision under Chapter XXXII. Now it is clear that when acting under section 476, the Civil and Revenue Courts are not exercising in any way such direct criminal powers as they are under sections 480 to 484, and it appears therefore anomalous that the Criminal Bench of the High Court should have Revisional Jurisdiction under section 476 from Civil and Revenue Courts which is apparently excluded in the case of convictions for contempt.

The Civil Court has no power to punish under 476 and merely expresses its judicial opinion as a Civil Court that the offender has rendered himself liable to the jurisdiction of the Criminal Court. That judicial opinion is liable to revision by the High Court in its revisional powers under section 115, Civil Procedure Code, and as Sir John Stan'ey says under that alone. There is, however, this decided conflict of opinion in all the Courts and Banerji J. points out that the same conflict has occurred in Bombay : *Queen-Empress v. Rachappa* (1) and *In re Bal Gangadhar Tilak* (2).

But we are only concerned with the decisions of this Court, and the questions therefore which we refer to the Full Bench are :—

(i) Was the case of *Kali Prosad Chatterjee v. Bhuban Mohini Dasi* (3) rightly decided ? or

(ii) Was the case of *Emperor v. Gopal Barik* (4) rightly decided ?

(iii) Has the High Court revisional powers under section 439, Criminal Procedure Code, in the case of orders passed by Civil and Revenue Courts under section 476 ?

(iv) Can the High Court in the exercise of its Criminal Jurisdiction look into such orders under section 15 of the Charter, or is section 115, Civil Procedure Code, the only section under which such orders can be revised ?

(v) If the latter, can the Bench exercising Criminal Jurisdiction deal with such matters under section 115, Civil Procedure Code ?

(1) (1888) I. L. R. 13 Bom. 109.

(3) (1903) 8 C. W. N. 73.

(2) (1902) I. L. R. 26 Bom. 785.

(4) (1906) I. L. R. 34 Calc. 42.



IMAM J. The question in this case is whether the propriety of an order of a subordinate Civil Court or a Revenue Court passed under section 476 of the Code of Criminal Procedure, directing an enquiry into offences brought under its notice in the course of a judicial proceeding, can be considered by a Criminal Bench of this Court. There is a divergence of opinion among the Judges of this and other High Courts, and I agree with my learned brother in thinking that in the conflicting state of authorities on this subject a reference to a Full Bench of this Court is necessary. The questions formulated cover all the aspects of the subject and I agree to the reference in their terms.

1913  
 ———  
 EMPEROR  
 v.  
 HAR PRASAD  
 DAS.

Whatever conflict there may be in the case-law, as to whether the High Court can, under section 439, interfere with an order for prosecution passed under section 476, it appears to me that the Act itself invests the Court with the fullest authority to deal with such an order as much as with any other order revisable by this Court. Prior to the passing of Act V of 1898, when the Code of 1882 was the law, no question was raised doubting the jurisdiction of this Court in exercising powers of revision over such orders. When the old Act was in force, in the case of *Ishri Prasad v. Sham Lal* (1) Petheram C.J., and Straight J., pointed out the inconvenience of a Munsif or a Subordinate Judge ordering prosecution to have to be examined as a complainant, and it seems that the inconvenience pointed out in that case led to the insertion, in section 476 of the amended Code of 1898, of the passage, "and as if upon complaint made and recorded under section 200." Were it not for this amendment there would have been no room to doubt the jurisdiction of the High Court. It has been contended, but with little reason, that by this amendment an order under section 476 ceases to be a proceeding and is a mere complaint which, when forwarded under the provisions of the section, is the basis of a case in which the Magistrate has to proceed according to law and in the same manner as if a complaint had been made and recorded under section 200. It is clear from the amending passage in section 476 that in order to facilitate the procedure of the Magistrate after the case has been sent to him, the order is treated as analogous to a complaint. It does not mean, nor can it mean, that the order in itself is a complaint. It seems to me that the words "as if" are important and ought not to be overlooked in construing the section. In the light of the amendment the proceedings before the Magistrate begin, as though cognizance had already been taken of the offence after complaint made and recorded and the case transferred to the Magistrate for trial. It therefore follows that a Court, Civil, Criminal or Revenue, is authorised under section 476 to take cognizance of offences mentioned in section 195

1913

EMPEROR  
v.HAR PRASAD  
DAS.

and a necessary corollary to this is that up to the stage of the case being sent on to a Magistrate, it is a criminal proceeding before the Court passing the order

I venture to hold and urge it as a principle that a power once given cannot be withdrawn without express words of withdrawal, and if withdrawal is suggested, by implication, from a phrase or a passage introduced in an amendment intended to obviate difficulties of procedure of subordinate Courts, such a withdrawal of power of the High Court could never be the meaning of the law.

In cases reported prior to 1893, e.g., *Khepu Nath Sikdar v. Grish Chunder Mukerjee* (1) and *Chaudhari Mahomed Izharul Huq v. Queen-Empress* (2), the learned Judges who decided those cases held, and correctly so, that the High Court had full jurisdiction to deal with such orders for prosecution.

I have already submitted that the amending passage in s. 476 is not a withdrawal of the powers of the High Court, and in spite of the amendment the provisions of 439 remain intact. The terms of that section are very general and the expression "any proceeding" is sufficiently extensive to embrace any and every order passed under the Code except such as are expressly excluded or are held to be so.

In *Kali Prosad Chatterjee v. Bhuban Mohini Dasi* (3), Rampini and Handley JJ. referred with approval to the case of *Erancholi Athan v. King-Emperor* (4), in which a Full Bench of the Madras High Court held that, where a Court had taken action under section 476 as a Court of Revision, the High Court had no power to interfere under section 439, and that the reasons for the decision in *Queen-Empress v. Srinivasalu Naidu* (5) were not applicable to the amended Code. This Full Bench decision of the Madras Court has however been reconsidered by another Full Bench of the same Court (6) and has been overruled. The case that Rampini and Handley JJ. had before them, had no reference to an order for prosecution under section 476 passed by a Magistrate, but was one in which a Munsif had passed the order. Thus whatever approval to *Erancholi's* case (4) may be gathered from the judgment of those two learned Judges, it is not to be forgotten that for the purposes of that case they were not considering the effect of section 439 in its relation to an order under section 476 passed by a Magistrate.

I now proceed to consider whether the High Court in its Criminal Revisional Jurisdiction is empowered to revise an order for prosecution passed

(1) (1889) I. L. R. 16 Cal. 730.

(2) (1892) I. L. R. 20 Cal. 349.

(3) (1903) 8 C. W. N. 73

(4) (1902) I. L. R. 26 Mad. 98.

(5) (1898) I. L. R. 21 Mad. 124.

(6) (1909) I. L. R. 33 Mad. 48.

under section 476 by a Civil or Revenue Court. Before I discuss or refer to any of the decided cases on the subject, I think it would be more useful to refer to the language of the law and derive such meaning as can be gathered therefrom. In dealing with the subject I may premise my remarks by referring to the preamble of the Act which lays down that the enactment is made because it is expedient to consolidate and amend the law relating to Criminal Procedure. Thus construing the Act from its preamble we have to hold that orders by even a Civil or Revenue Court under the provisions of the Act come within Criminal Procedure, and therefore, whatever ordinarily the Civil or Revenue functions of a Court may be, its orders under the Act remain to be governed by the provisions of the Act, and section 4 (j) defines that a "High Court" means the highest Court of Criminal Appeal or Revision. Chapter XXXII of the Act deals with matters of Reference and Revision, and to elucidate the point in question it is worthy of note that section 435 deals with the calling of records from "any inferior Criminal Court;" and sections 436 to 438 deal with the examination of record under section 435, which in other words limits us to the records of inferior Criminal Courts; but section 439 is much more general and much more extensive in its comprehension and, without limiting the High Court to exercise its jurisdiction over the inferior Criminal Courts, allows it to deal with any proceeding, record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge. In this section no limitation has been placed as to the character of the Court against whose orders powers of revision have to be exercised, and as I have already drawn attention to the preamble of the Act, it follows as a sequence to legitimate interpretation that orders under section 476 passed by a Civil or Revenue Court come within the scope of s. 439.

In the case of *Bhup Kunwar* (1), Stanley, C.J., held that to understand the true scope of section 439 it was necessary to consider the four preceding sections, and particularly section 435, and that on a true interpretation of section 439 it applied only to a proceeding such as was expressly mentioned in section 435, namely, a proceeding before an inferior Criminal Court. I may be permitted to point out that, while sections 436 to 438 by express words are governed by section 435, the provisions of section 439 have no such limitation on them. It is obvious that all reference to section 435 has been left out from the words of s. 439 with an object, and that being that the judicial power of the highest Court of Justice should remain unfettered. It seems to me that section 439 is not circumscribed by section 435 to the exclusion of all other powers of revision and holds much more than section 435 contemplates.

1913

EMPEROR  
v.  
HAR PRASAD  
DAS.

1913

EMPEROR  
v.  
HAR PRASAD  
DAS.

In *Emperor v. Gopal Barik* (1), Mitra and Ormond JJ. held that the High Court had power under section 439 to revise such orders whether passed by a Criminal or a Civil Court, although a contrary view of the law had been previously taken by Rampini and Handley JJ. in the case of *Kali Prosad Chatterjee* (2), wherein they expressed their view that the Criminal Bench of the High Court had no authority to interfere under section 439 with the proceedings of a Munsif taken under section 476.

Further, it seems to me the jurisdiction of the Criminal Bench of this Court cannot be ousted once the proceedings under section 476 have been forwarded to the Magistrate for inquiry into the alleged offence; for the High Court in its exercise of Criminal Jurisdiction, even if it be taken in its limited sense, can send for the record from the Court of the Magistrate and can proceed to consider whether the Magistrate should or should not go on with the trial of the case.

As regards the third question, whether the High Court in its Criminal Jurisdiction is empowered under section 15 of the Charter to exercise superintendence over the Civil and Revenue Courts in respect of such orders, I see nothing in the Charter to forbid it.

Dealing with whether section 115, Civil Procedure Code, is the only provision of the law under which such orders by Civil Courts can be subjected to revision, I venture to rely on the views I have already expressed and I am persuaded to hold that such an order is revisable by the High Court under the Criminal Procedure Code, the Charter and the Civil Procedure Code alike.

I now take the last question, namely, is a Criminal Bench of this Court vested with powers of a Court of Civil Appeal; and can it revise such an order under section 115 of the Code of Civil Procedure? The powers of a Judge of the High Court have not been limited by any legislative definition, and I venture to think that a Judge of this Court is inherently, by reason of his position as such, invested with civil and criminal powers alike, and in whatsoever Bench he may sit he is not divested of any of the powers that he, as a member of a Court of record, individually represents. The formation of Benches is governed by sections 13 and 14 of the Charter. Under the latter section it is for the Chief Justice to determine what Judges of the Court shall constitute the several Division Courts, but that is merely an arrangement for convenience of administration of justice, as is laid down in section 13 of the Charter. There are no words in section 13 which derogate from the inherent powers of a Judge. In *Hara Charan Mookerjee v. King-Emperor* (3), which was a case of an order for

(1) (1906) I. L. R. 34 Calc. 42.      (2) (1903) 8 C. W. N. 73.

(3) (1905) I. L. R. 32 Calc. 367.

prosecution under section 476 passed by a Munsif, Harington J. held that a Criminal Bench of this Court had jurisdiction to deal with the question under the powers vested in the Bench as a Court of Criminal appeal or a Court of Civil appeal, and Pargiter, J., held that as a Criminal Bench they had no jurisdiction to deal with the proceedings taken by Civil Courts under section 476, but he, nevertheless, held that the Judges of the Criminal Bench could deal with the matter under section 622, Civil Procedure Code (section 115 of the new Code) in their Civil Jurisdiction. This case was decided after the case of *Kali Prosad Chatterjee* (1) and though not disagreeing with it, Pargiter J. pointed out that their Civil Jurisdiction was exerciseable even though they were sitting in the Criminal Bench.

It will be a matter for future consideration whether the particular order now impugned should be set aside or not, regard being had to the terms of the answer given to this reference by the Full Bench.

*Mr. S. P. Sinha* (*Babu Dasarathi Sanyal* and *Babu Manmatha Nath Mukerji* with him), for the petitioner. There can be no question as to the power of the High Court to revise under s. 439 of the Criminal Procedure Code orders passed by Criminal Courts under s. 476.

[HOLMWOOD J. Is that under s. 439 or the Charter?]

I contend under s. 439.

The question now is—Can this Court interfere in orders passed by Civil or Revenue Courts under s. 476 of the Criminal Procedure Code? and, if so, whether the Civil Appellate or the Criminal Appellate side has jurisdiction? My contention is that when a Court proceeds under s. 476, the Court acts as a Criminal Court, whether it is a Civil, Revenue or a Criminal Court, and the Criminal Appellate side of the High Court has jurisdiction to interfere under s. 439.

[JENKINS C.J. What do the words “may send the case” in s. 476 mean? Do you contend that the Court may send in its administrative capacity?]

I contend that it is a judicial order under s. 476. S. 195 deals with the case where sanction is given by

1913

EMPEROR

v.

HAR PRASAD  
DAS.

1913  
 EMPEROR  
 v.  
 HAR PRASAD  
 DAS.

the Court to a private individual or a complaint is made by the Court as a private person. When a Court acts under s. 476, the Court does not act as a private person, and passes an order in its judicial capacity. It is a great deal more than merely sending records for action by another Court. It contemplates a procedure that cannot be availed of by a private person as a complainant: see also s. 478. In taking proceedings under s. 476 or 478, the Court has to consider whether it will complete enquiry itself, or send the case to the nearest Magistrate for enquiry. In s. 478, it is clear that the Court is not acting as a private person. That is so also in s. 476. S. 195 is different in this matter.

The words "subject to the provisions of s. 476" in s. 200 do not mean that the Court makes a "complaint" under s. 476. Those words were added by Act V of 1898 and only mean that in a case which is sent under s. 476 by any Court to a Magistrate for enquiry and trial, the Court which sends to the Magistrate need not be examined on oath.

S. 476 is totally independent of s. 195.

The question is whether an order made or proceeding taken under s. 476 is controllable by s. 439.

It has been argued that s. 439 is to be read with s. 435, when the former speaks of "proceedings before any *inferior Criminal Court*."

In ss. 436 to 438, reference is expressly made to s. 435. But in s. 439, there is no such reference to s. 435.

[STEPHEN J. What do the words "or otherwise" mean?]

These words mean, perhaps—brought to its notice, in some other way.

[HOLMWOOD J. It may mean reference.]

But reference only to the High Court is contemplated here. Reads ss. 432 to 434.

The words "or otherwise" have been explained in *Nobin Kristo Mookerjee v. Russick Lall Laha* (1).

The omission of restricting clauses in s. 439, as there are in ss. 436 to 438, shows that unlimited powers of revision by High Court was the intention of the Legislature. Why should we then think that s. 476 was excluded?

[HOLMWOOD J. Then s. 145 would also come under s. 439. But in those cases we interfere under the Charter.]

The answer to that is that having once distinctly excluded s. 145 from revision under s. 435, the generality of the terms of s. 439 could not extend its operation to cases under s. 145. Moreover, the question does not directly arise here except so far as the construction of s. 439 goes.

[JENKINS C. J. What powers does this Court exercise under s. 439 in a case under s. 476?]

The powers are conferred by s. 423(c). The other clauses of s. 423 and no other sections are applicable.

[JENKINS C. J. S. 423(c) speaks of an "order". You must therefore have an "order" under s. 476 that has to be set aside. What is the nature of the "order" here? Do you take it to be a "sanction" or a "complaint"?]

It is neither. It is in the nature of a complaint, not exactly a 'complaint'.

The earliest Act is Act XXV of 1861. The Penal Code was passed in 1860, but it was to take effect from the 1st May 1861.

The Civil Procedure Code (XXIII of 1861), amending Act VIII of 1859, expressly lays down the procedure to be followed by Civil Courts in certain





[STEPHEN J. It is usual to have an order like the one we have here. But it is questioned whether such orders are strictly within the provisions of the law.]

[HOLMWOOD J. An order of commitment under s. 478 can be quashed by this Court by the special powers given by s. 215.]

That is so, but I go further and contend that your Lordships may interfere even before a matter proceeds to the stage of commitment. The jurisdiction of the Civil or the Criminal Appellate Side is another question. In the matter of *Kali Prosunno Bagchee* (1), s. 471 was the corresponding section and this was before Revenue Courts were included by the Act of 1882.

[STEPHEN J. Who issued the warrant in that case?]

Evidently the Magistrate.

[JENKINS C. J. That was at a very late stage, and the case throws no light on your contention. It is really against you, as proceedings were not interfered with at the stage in which you wish it to be.]

[STEPHEN J. In the present case, the High Court left untouched the original order authorizing the Magistrate to issue warrant.]

But the Court must find that the letter authorizing the Magistrate to take action was bad before it could quash the warrant. So the starting proceedings *were* really touched.

The case of *Queen v. Baijoo Lall* (2) is directly in point. Here the order of the District Judge who initiated proceedings was directly considered by this Court: see also *Jadu Nandan Singh v. Emperor* (3).

It has always been held that such proceedings initiating or directing prosecutions are *orders*: see

(1) (1875) 23 W. R. Cr. 39. . . . (2) (1876) I. L. R. 1 Calc. 450.

. . . . (3) (1909) I. L. R. 37 Calc. 250.

1913  
 ———  
 EMPEROR  
 v.  
 HAR PRASAD  
 DAS.

*Bahadur v. Eradatullah Mallick* (1) which was decided by a Special Bench. See also *In the matter of Mutty Lall Ghose* (2), *Khepu Nath Sikdar v. Grish Chunder Mukerji* (3), *Chaudhari Mahomed Izharul Huq v. Queen-Empress* (4), *Baperam Surma v. Gouri Nath Dutt* (5), *Mahomed Bhakku v. Queen-Empress* (6). The last case is also authority for holding that in so far as it could be treated as an 'order,' this Court has jurisdiction to interfere. See the case of *Hara Charan Mookerjee v. King Emperor* (7). Parts of the judgments in that case are no longer law. See also the case of *Surjya Hariani v. King-Emperor* (8).

[HOLMWOOD J. That was not a case of jurisdiction to take proceedings under s. 476 pure and simple.]

*Emperor v. Gopal Barik* (9) is also in our favour.

The general current of decisions supports our contention. *Kali Prosad Chatterjee v. Bhuban Mohini Dasi* (10) is an exception.

Of the other cases referred to in one or other of the judgments in the Reference, *Hem Chandra Ray v. Atal Behari Ray* (11) is a Civil Rule. It does not throw much light on the present question. *Dakshineswar Misra v. Haris Chundra Chatterji* (12) is also a Civil Rule, and it was questioned there whether the Civil or the Criminal Appellate Side of the High Court has jurisdiction to hear such applications. *Queen-Empress v. Rachappa* (13) is distinguishable and the principle of the judgment was not accepted in *In re Bal Gangadhar Tilak* (14). *Queen-Empress*

(1) (1910) I. L. R. 37 Calc. 642.

(8) (1901) 6 C. W. N. 295.

(2) (1880) I. L. R. 6 Calc. 308.

(9) (1906) I. L. R. 34 Calc. 42, 45.

(3) (1889) I. L. R. 16 Calc. 730.

(10) (1903) 8 C. W. N. 73.

(4) (1892) I. L. R. 20 Calc. 349.

(11) (1908) I. L. R. 35 Calc. 909.

(5) (1892) I. L. R. 20 Calc. 474.

(12) (1909) 10 C. L. J. 450.

(6) (1896) I. L. R. 23 Calc. 532.

(13) (1888) I. L. R. 13 Bom. 109.

(7) (1905) I. L. R. 32 Calc. 367.

(14) (1902) I. L. R. 26 Bom. 785.

*v. Srinivasalu Naidu* (1) was overruled by *Eranholi Athan v. King-Emperor* (2). The latter case is against us. In a still later Full Bench case in Madras, *Ottupura Narayanan Somayajipad v. Emperor* (3), Rahim J. points out that *Eranholi's* case (2) has been ignored in several later cases. The last Full Bench case (3) practically overrules the previous cases. The Allahabad cases, *In re Bhup Kunwar* (4) and *Salig Ram v. Ramji Lal* (5), are against me, but the last case was one under s. 195.

1913  
EMPEROR  
F.  
HAR PRASAD  
DAS.

It would be anomalous to hold that while the High Court has jurisdiction to revise orders passed by Criminal Courts under s. 476, it has none in Civil Courts taking action under that section; and the situation would be worse if it be held that there is jurisdiction in orders made by Revenue Courts, as s. 115 of the Civil Procedure Code has no application there.

[MOOKERJEE J. But you have the Charter.]

That is doubtful. Is a Revenue Court subject to the appellate jurisdiction of the High Court?

[JENKINS C. J. If we cannot interfere under the Charter, how can we under the Code?]

The only way to avoid the anomaly would be to hold that the High Court has jurisdiction to interfere in proceedings taken by all Courts under s. 476.

[JENKINS C. J. It would be equally free from anomaly if we hold that these are not "orders" at all.]

That is so, but that would mean reversing a long current of decisions, and that is not the point referred to your Lordships.

[JENKINS C. J. But that necessarily arises: see s. 200. What is the meaning of the words "subject to

(1) (1898) I. L. R. 21 Mad. 124. (3) (1909) I. L. R. 33 Mad. 48.

(2) (1902) I. L. R. 26 Mad. 98. (4) (1903) I. L. R. 26 All. 249.

(5) (1906) I. L. R. 28 All. 554.

1913  
 EMPEROR  
 v.  
 HAR PRASAD  
 DAS.

the provisions of s. 476" if the proceeding under s. 476 is not a *complaint* ?]

That is only to guard against it being said that the Magistrate was making a "complaint" in proceedings under s. 476 and protect him from an examination in Court as a complainant under s. 200. It gives effect to *Ishri Prasad v. Sham Lal* (1).

See s. 537, cls. (a) and (b). In those clauses two very different kinds of proceedings are mentioned in the same section. This implies that proceedings under s. 476 to which cl. (b) refers are as much subject to appeal or revision as those before the Magistrate to to which cl. (a) refers.

It was held in *Abdullah Khan v. Emperor* (2) that preliminary enquiry under s. 476 is a judicial proceeding. My contention is that proceedings taken by any Court under s. 476, be it Civil, Revenue or Criminal, are judicial proceedings. S. 115 of the Civil Procedure Code is much more restricted in scope than s. 439 of the Criminal Procedure Code.

As regards s. 145 proceedings, they are proceedings of an inferior Criminal Court and are directly covered by s. 435, cl. (3). The jurisdiction of this Court under the Code is expressly taken away.

[MOOKERJEE J. Is it so? It merely says that they are not "proceedings within the meaning" of s. 435. They may be proceedings under s. 479.]

That may be so. But such proceedings having once been excluded under s. 435, is it likely that they would be included again in s. 439?

[MOOKERJEE J. So you read s. 439 as controlled by s. 435: see the definition of "Criminal Courts" in s. 6.]

That list is not exhaustive. A Civil or Revenue Court when taking action under s. 476, may be regarded a Criminal Court for particular purposes.

1913  
 EMPEROR  
 v.  
 HAR PRASAD  
 DAS.

*The Deputy Legal Remembrancer (Mr. Orr) (Babu Atulya Charan Basu with him), for the Crown.* S. 476 was enacted to avoid the inconvenience of a Judge or Magistrate to appear in a Court as a complainant. The language and history of the section show that proceedings initiated under that section should be taken as a complaint.

Now, *first*, whether a proceeding under s. 476 is an *order* or a *complaint*: see *Ishri Prasad v. Sham Lal* (1), followed in *Emperor v. Arjan Pramanik* (2), and *Queen-Empress v. Rachappa* (3). See also *Eranholi Athan v. King-Emperor* (4). Nearly all High Courts are agreed so far.

*Next*, on the question, whether the High Court in its criminal jurisdiction can revise an order under s. 439 unless the Court is subordinate to High Court in the criminal jurisdiction. The question is—Is the Civil or Revenue Court initiating proceedings under s. 476 subordinate to the High Court in its criminal jurisdiction? I contend it is not so. A Court also can hardly be called a Criminal Court merely by acting under s. 476: see s. 6 of the Criminal Procedure Code. S. 476 should be read with s. 435: see *Salig Ram v. Ramji Lal* (5), per Knox J., *In re Bhup Kunwar* (6) and *Hari Dass Sanyal v. Saritulla* (7).

[MOOKERJEE J. See *Ramadhin Bania v. Sewbalak Singh* (8).]

- |                                      |                                   |
|--------------------------------------|-----------------------------------|
| (1) (1885) I. L. R. 7 All. 871, 873. | (5) (1906) I. L. R. 28 All. 554.  |
| (2) (1904) I. L. R. 31 Calc. 664.    | (6) (1903) I. L. R. 26 All. 249.  |
| (3) (1888) I. L. R. 13 Bom. 109.     | (7) (1888) I. L. R. 15 Calc. 608. |
| (4) (1902) I. L. R. 26 Mad. 98.      | (8) (1910) I. L. R. 37 Calc. 714. |

1913

EMPEROR  
v.  
HAR PRASAD  
DAS.

See also *In re Ram Prasad Malla* (1), *In re Chennanagoud* (2) and *Kali Prosad Chatterjee v. Bhuban Mohini Dasi* (3). All these cases hold that s. 115 of the Civil Procedure Code is applicable in such cases.

*Ottupura Narayanan Somayajipad v. Emperor* (4) clearly lays down that the Criminal Appellate Side has jurisdiction only when a Criminal Court has taken action under s. 476. This case read with *Kali Prosad's* case (3) makes it all clear. In *Emperor v. Gopal Barik* (5), the order was the order of a Criminal Court and it is doubtful whether their Lordships decided definitely that this Court had powers over Courts other than Criminal Courts.

[JENKINS C.J. Is there any case in which this High Court has held that proceedings initiated by a Civil Court can be revised under s. 439 of the Criminal Procedure Code?]

*Queen v. Baijoo Lall* (6) is the only case. But in that there is no reference to the section corresponding to s. 439 of the present Code.

[*Mr. Sinha*. The heading of the report shows it was the Criminal Side.]

The actual decision was on the point of jurisdiction.

[*Mr. Sinha*. It was on the merits as to the preliminary enquiry, which it has been held should be gone into in revision.]

[MOOKERJEE J. See *Mathura Sahu v. Damri Ram* (7). If it were a criminal matter, we would have been bound to refer the case to a third Judge under s. 429.]

(1) (1909) I. L. R. 37 Calc. 13.

(4) (1909) I. L. R. 33 Mad. 48.

(2) (1902) I. L. R. 26 Mad. 139.

(5) (1906) I. L. R. 34 Calc. 42.

(3) (1903) 8 C. W. N. 73.

(6) (1876) I. L. R. 1 Calc. 450.

(7) (1911) 15 C. L. J. 337.

It has been the consistent practice in this Court to deal with such matters in the Civil or Criminal Side according as it comes from a Civil or a Criminal Court. *Bahadur v. Eradatullah Mallick* (1), *Bhagabat Prasad Singh v. King Emperor* (2), *Begu Singh v. Emperor* (3). Most of the cases cited on the other side were decided on the question of jurisdiction.

1913  
EMPEROR  
F.  
HAR PRASAD  
DAS.

On the point that certain sections have been omitted in the new Civil Procedure Code, my submission is that the omission was made to avoid repetition. It does not take away the jurisdiction of the civil side.

Who is to try on a remand by the Criminal Bench? And if Mr. Sinha is right, an order of a Judge sitting on the Original Side could be revised by the Criminal Bench of this Court.

*Mr. Sinha*, in reply. All relevant sections have to be read together. In *Hari Dass Sanyal v. Saritulla* (4), there was no question as to how far the powers conferred by s. 439 are or are not independent of the powers conferred by s. 435.

As regards the practice of this Court, there has been some variation both as regards s. 476 and s. 195. Convenience is all in favour of revision by the Criminal Bench. Treatment under s. 115 of the Civil Procedure Code and s. 439 of the Criminal Procedure Code would be different. The same principle of treatment should apply, in this matter, whether the proceedings were initiated by a Civil or a Criminal Court. The moment action is taken under s. 476 by a Civil Court, the Court is converted, so to say, to a Criminal Court, by virtue of its exercising powers conferred on it by the Criminal Procedure

(1) (1910) I. L. R. 37 Calc. 642. (3) (1907) I. L. R. 34 Calc. 551.

(2) (1911) 14 C. L. J. 120.

(4) (1888) I. L. R. 15 Calc. 608, 619.

1913  
 ———  
 EMPEROR  
 v.  
 HAR PRASAD  
 DAS.

Code. The difficulty is—to what Criminal Court is such a Court inferior? My answer is that all Courts are inferior to the High Court, under the very constitution of this Court by the Letters Patent or the Charter. As regards the stage at which a Civil Court becomes a Criminal Court, I say that even if it be held to be no Criminal Court when it makes the preliminary enquiry, it is certainly so when it arrests the accused etc.

[HOLMWOOD J. Then we shall have several Criminal Courts not contemplated by the Legislature.]

That is so. S. 6 of the Criminal Procedure Code distinctly says so. S. 478(2) also shows that where a Munsif makes the inquiry himself, instead of sending the case to a Magistrate for it, he acts as a Criminal Court.

[HOLMWOOD J. It is only under ss. 36 and 41 of the Criminal Procedure Code that Criminal Courts may be constituted.]

Supposing the High Court revised under s. 215 an order passed under s. 478, it does so as a Criminal Court certainly.

[HARRINGTON J. But are not the records the records of a Civil Court?]

When a Civil Court sends a case to a Criminal Court for action, undoubtedly it forms part of a record in a Civil Court, but the Criminal side of the High Court can send for the records of the case, and quash proceedings, or take other steps.

[STEPHEN J. Shall we only look to the result of the initiation of proceedings? That would cause no anomaly.]

But when you consider it, you can go to the very root of it all.

[STEPHEN J. I have doubts about it.]



As regards the remarks of Knox J. in *Salig Ram v. Ramji Lal* (1), no such question can arise in proceedings under s. 476, as the order must be made by a "Court" and in the course of a "judicial proceeding."  
*Cur adv. vult.*

1913  
 ———  
 EMPEROR  
 v.  
 HAR PRASAD  
 DAS.

The judgment of the Court (JENKINS C.J., HARRINGTON, STEPHEN, MOOKERJEE AND HOLMWOOD JJ.) was as follows : —

The questions referred for decision by a Full Bench have been framed in the following terms :—

(i) Was the case of *Kali Prosad Chatterjee v. Bhuban Mohini Dasi* (2) correctly decided ?

(ii) Was the case of *Emperor v. Gopal Barik* (3) rightly decided ?

(iii) Has the High Court revisional powers under section 439 of the Criminal Procedure Code in the case of orders passed by Civil and Revenue Courts under section 476 ?

(iv) Can the High Court in the exercise of its Criminal Jurisdiction, look into such orders under section 15 of the Charter, or, is section 115 of the Civil Procedure Code the only section under which such orders can be revised ?

(v) If the latter, can the Bench exercising Criminal Jurisdiction deal with such matters under section 115 of the Civil Procedure Code ?

The solution of these questions must depend primarily upon the true construction of sections 439 and 476 of the Criminal Procedure Code ?

Sub-section (1) of section 476 provides that "when any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in section 195 and committed before it or

(1) (1906) I. L. R. 28 All. 554. (2) 1903) 8 C. W. N. 73.

(3) (1906) I. L. R. 34 Calc. 42.

1913  
 EMPEROR  
 v.  
 HAR PRASAD  
 DAS.

brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary enquiry that may be necessary, may send the case for enquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody, or take sufficient security for his appearance, before such Magistrate; and may bind over any person to appear and give evidence on such inquiry or trial." On behalf of the petitioner it has been contended that when action is taken by a Civil Court under section 476 the proceeding before it is a proceeding within the meaning of the first sub-section either of section 435 or of section 439 of the Criminal Procedure Code. This argument, in each of its two branches, is, in our opinion, unsound. Sub-section (1) of section 435 authorises this Court to call for and examine the record of any proceeding before *any inferior Criminal Court* situate within the local limits of its jurisdiction. When a Civil Court, subordinate to this Court, takes action under section 476, it cannot plainly be deemed an *inferior Criminal Court* within the meaning of sub-section (1) of section 435. That section consequently has no application. Nor does section 439 touch the matter. It is clear that sections 435-439 must be read together as pointed out by Wilson J. in *Hari Dass Sanyal v. Saritulla* (1). Section 439 must, therefore, be read along with and subject to the provisions of section 435. It follows that when an order has been made by a Civil Court under section 476 of the Criminal Procedure Code, it cannot be revised by this Court under section 439. It is equally plain that the order may be revised by this Court under section 115 of the Civil Procedure Code on any of the grounds mentioned therein, or may be examined under section 15 of the High Courts Act.

(1) (1888) I. L. R. 15 Calc. 608, 617.

When action is taken by a Criminal Court subordinate to this Court under section 476 of the Criminal Procedure Code, the proceeding before it is obviously a proceeding before an inferior Criminal Court within the meaning of section 435, and the order made therein is consequently liable to revision under section 439.

1913  
EMPEROR  
v.  
HAR PRASAD  
DAS.

When action is taken by a Revenue Court under section 476, the proceeding before it is, for the reasons already assigned, not a proceeding before an inferior Criminal Court within the meaning of section 435. The order made therein is accordingly not open to revision under section 439 read with section 435. But the order is open to revision under section 115 of the Civil Procedure Code on any of the grounds mentioned therein, or under section 15 of the High Courts Act, 24 and 25 Vict. c. 104; the order is made by a revenue authority as a Court in the course of a judicial proceeding before it; with reference to such judicial proceeding, the Revenue Court is a Court subordinate to this Court within the meaning of section 115 of the Civil Procedure Code, and is a Court subject to the Appellate Jurisdiction of this Court within the meaning of section 15 of 24 and 25 Vict. c. 104.

In view of this exposition of the law, the questions submitted to this Bench must be answered as follows:—

(i) The case of *Kali Prosad Chatterjee v. Bhuban Mohini Dasi* (1) was correctly decided, in so far as it held that an order under section 476 of the Criminal Procedure Code made by a Civil Court (in that case, the Court of a Munsif) cannot be revised by this Court under section 439.

1913

EMPEROR  
v.  
HAR PRASAD  
DAS.

(ii) The case of *Emperor v. Gopal Barik*(1) was correctly decided, in so far as it held that an order under section 476 of the Criminal Procedure Code made by a Criminal Court (in that case, the Court of a Sub-divisional Magistrate) can be revised under section 439.

(iii) In the case of an order passed under section 476 by a Civil or a Revenue Court, section 439 has no application.

(iv) In the case of an order passed by a Civil or Revenue Court under section 476, the High Court can exercise the powers vested in it by section 115 of the Civil Procedure Code or section 15 of the High Courts Act.

(v) When an order under section 476 made by a Civil or a Revenue Court is sought to be revised by this Court, the Bench exercising criminal jurisdiction cannot, as such, deal with the matter, but the Judges composing that Bench may do so, if authorised by the Chief Justice under section 14 of the High Courts Act.

In the case before us, the order in question was made by a Settlement Officer dealing with proceedings under Chapter X of the Bengal Tenancy Act. His order is consequently not open to revision under section 439 of the Criminal Procedure Code, but may be examined under section 115 of the Civil Procedure Code or section 15 of the High Courts Act. With this intimation of the opinion of the Court, the case is returned to the Referring Bench in order that it may be dealt with according to law.

S. M.

**APPELLATE CIVIL,**

*Before Mookerjee and Beachcroft JJ.*

**BHOLA NATH ROY***v.***SECRETARY OF STATE FOR INDIA.\***

1912

*Aug. 26.*

*Notice—Secretary of State for India in Council, suit against—Notice by two out of sixty-three joint owners of land—Sufficiency of Notice—Waiver—Estoppel—Objection taken at a late stage, if permissible—Civil Procedure Code (Act V of 1908) s. 80.*

Under s. 80 of the Code of Civil Procedure it is essential that the notice should state the names, descriptions, and places of residence of all the plaintiffs.

Where a suit was brought by sixty-three plaintiffs against the Secretary of State for India in Council and others, and the notice of the suit contained the names, descriptions, and places of residence of two out of the sixty-three plaintiffs :

*Held*, that such a notice was insufficient and did not fulfil the requirements of the statute.

*The Secretary of State for India v. Perumal Pillai* (1) and *Manindra Chandra Nandi v. The Secretary of State for India* (2) referred to.

It is competent to the Secretary of State to waive the notice, and he may be estopped by his conduct from pleading the want of notice at a late stage of the case.

*Manindra Chandra Nandi v. The Secretary of State for India* (2) referred to.

Where the written statement contained an objection as to the validity of the notice, but no objection was taken by the Secretary of State at any stage of the trial to its omission and it was the second defendant who

\* Appeal from Appellate Decree, No. 1597 of 1912, against the decree of L. Palit, District Judge of Bankura, dated April 30, 1912, reversing the decree of Saradaprasad Bakshi, Munsif of Bankura, dated March 2, 1911.

1912

BHOLA  
NATH ROY  
v.  
SECRETARY  
OF STATE  
FOR INDIA.

prayed, just before the trial began, that an additional issue might be raised on this question :

*Held*, that it was not competent to the second defendant to raise this question.

SECOND APPEAL by Bhola Nath Roy and others, the plaintiffs.

This was a suit brought by Bhola Nath Roy and 62 other plaintiffs against the Secretary of State for India in Council, Manindra Chandra Nandi, who was the Maharajah of Cossimbazar, and Jyoti Prasad Singh, for declaration of title to land and for recovery of possession and mesne profits. On the 23rd June, 1909, under the Government Dearsa Settlement, a tract of land was treated as *char* formed in the bed of the river Damodar, and settled with the Maharajah, and formal possession was made over to him soon after that date. When, however, he went to take actual possession of these lands, he was resisted by some of the plaintiffs in this suit, and proceedings were instituted under section 145 of the Code of Criminal Procedure, resulting, on the 29th November, 1909, in the possession of the Maharajah being ordered and maintained. On the 17th December, 1909, the plaintiffs filed this suit for recovery of possession, alleging that the lands in dispute appertained to certain mauzas contained in the zamindari of the defendant No. 3 and, as *maurassi mokrari jagirdars* of these mauzas under this defendant, they had a permanent right to the lands in suit, that the Secretary of State for India in Council had no right to assess the lands to revenue and to settle them with the defendant No. 2, and that they were entitled to the lands by adverse possession. Notice of this suit was given in the statutory form by only two of the plaintiffs to the Secretary of State for India in Council by filing it in the Bankura Collectorate. In the written statement filed by the Secretary

of State, on the 12th April, 1910, it was contended that the notice was insufficient and not in accordance with the law, and that the plaintiffs had no right whatsoever to the lands in dispute. The Maharajah in his written statement filed on the same date dealt with the merits of the case. The defendant No. 3, who filed his written statement a week later, supported the case for the plaintiffs and maintained that, if it were competent to Government to settle the lands in dispute, they should be settled with him, as they were within the limits of his zamindari. On the 2nd May, 1910, the Court framed seven issues which did not include an issue upon the question of the legality, validity and sufficiency of the notice under section 80 of the Code of Civil Procedure, 1908. On the 25th June, 1910, the plaintiffs prayed for a local investigation which was granted, and, on the 8th December, the Commissioner appointed to investigate submitted his report. The Court, thereupon, directed that the parties should file their objections, if any, within one week from that date. On the 13th January, 1911, when the suit came on for trial, the Maharajah filed a supplementary written statement with the leave of the Court and prayed that three new issues might be raised. One of these proposed new issues related to the validity of the notice served under section 80 upon the Secretary of State for India in Council, and was permitted by the Court to be raised, while the other two issues were held to be covered by the issues previously raised. The Court of first instance decreed the suit, but on appeal by the defendants Nos. 1 and 2 this decree was reversed and the suit dismissed, on the ground that the notice to the Secretary of State for India in Council was signed by two of the plaintiffs and not by the whole body of them. The plaintiffs, thereupon, appealed to the High Court.

1912

BHOLA  
NATH ROY  
v.  
SECRETARY  
OF STATE  
FOR INDIA

1912

BHOLA  
NATH ROY  
v.  
SECRETARY  
OF STATE  
FOR INDIA.

*Babu Harendra Narain Mitra and Babu Bankim Chandra Mookerjee*, for the appellants. The Secretary of State may be a proper party, but he is not a necessary party. The provisions of section 80 of the Code of Civil Procedure have been sufficiently complied with, inasmuch as notice was given by two of the appellants. The mere mentioning of the names of all the plaintiffs is not necessary, for the Government cannot be prejudiced by not knowing the personality of the plaintiffs. The object of the section is to inform the Government of the fact that a suit has been filed against it and of the nature of the suit, so that it may have an opportunity of settling the claim, if so advised, and it is sufficient if the notice substantially fulfils this object. The case of *The Secretary of State for India v. Perumal Pillai* (1) is in my favour. Having regard to the plain intention of the Legislature, certain restrictions have been imposed on the wording of section 80: see *Bholaram Chowdhury v. Administrator General* (2) and *Jehangir M. Cursetji v. The Secretary of State for India* (3).

The prayer against the Secretary of State is merely a subsidiary one. He was not, as I have said before, really a necessary party to this suit; but bringing him on the record was done to put a stop to all further litigation. This suit might proceed against the other defendants as a suit for ejectment.

Then again the objection as to notice was raised too late and that, by the defendant No. 2, and ought not to have received any consideration. No issue was framed on behalf of the Secretary of State at any stage of the case as to the sufficiency or legality of the notice, though it was pleaded by him in his

(1) (1900) I. L. R. 24 Mad. 279. (2) (1904) 8 C. W. N. 913.

(3) (1902) I. L. R. 27 Bom. 189.



written statement. This conduct of his amounted to a waiver of his claim to a notice, or, at any rate, he is estopped from raising it at a late stage in the case; see *Manindra Chandra Nandi v. The Secretary of State for India* (1). This appeal should, therefore, be allowed.

*Babu Ram Charan Mitra*, for the Secretary of State for India in Council.

*Babu Jogesh Chandra Dey*, for Manindra Chandra Nandi, the defendant No. 2.

MOOKERJEE AND BEACHCROFT JJ. This is an appeal on behalf of the plaintiffs in a suit for declaration of title to land and for recovery of possession and mesne profits. There were three defendants in the action; the first was the Secretary of State for India in Council; the second was the Maharajah of Cossimbazar and the third was Jyoti Prosad Singh. The suit was commenced on the 17th December, 1909. The written statement on behalf of the Secretary of State was filed on the 12th April, 1910. In the first paragraph of this written statement, it was urged that notice under section 80 of the Code of Civil Procedure of 1908 was not sufficient, proper and in accordance with law. The written statement of the second defendant, filed on the same date, dealt with the merits of the case. The third defendant filed his written statement a week later and supported the claim of the plaintiffs. On the 2nd May, 1910, the Court framed seven issues, which did not include an issue upon the question of the legality, validity and sufficiency of the notice under section 80. On the 25th June, 1910, the plaintiffs prayed for a local investigation. This application was granted and a Commissioner was appointed. The Commissioner

1912  
BHOLA  
NATH ROY  
v.  
SECRETARY  
OF STATE  
FOR INDIA

1912

BHOLA  
NATH ROY  
v.  
SECRETARY  
OF STATE  
FOR INDIA.

submitted his report on the 8th December, 1910. The Court thereupon directed that the parties should file their objection, if any, within one week from that date. The suit came for trial on the 13th January, 1911. On that date, the second defendant filed a supplementary written statement with the leave of the Court. He also prayed that three new issues might be raised. One of these proposed new issues related to the validity of the notice served under section 80 upon the Secretary of State for India in Council. The Court held that of the three new issues proposed, two were covered by the issues previously raised; but that an additional issue must be raised upon the question of the legality, validity and sufficiency of the notice under section 80. An additional issue to that effect was accordingly raised. The suit was then tried out on the merits, and decreed in favour of the plaintiffs. The defendants appealed to the District Judge and urged that the suit ought to fail, as there was no proper service of notice under section 80 of the Code of Civil Procedure. The District Judge held that as there were 63 plaintiffs and notice had been given by only two of them the notice could not be deemed valid. In this view, the District Judge reversed the decree of the Court of first instance and returned the plaint to the plaintiffs. The plaintiffs have now appealed to this Court and contended, *first*, that the notice was proper and sufficient; and, *secondly*, that a notice under section 80 had been waived by the Secretary of State for India in Council.

In support of the first ground, it has been urged, upon the authority of the decision in *The Secretary of State for India v. Perumal Pillai* (1), that a notice by two out of several persons who institute a suit is sufficient for the purpose of section 80 of the Code

of 1908. In our opinion, this contention is not well founded. Section 80 provides as follows:—"No suit shall be instituted against the Secretary of State for India in Council until the expiration of two months next after notice in writing has been delivered to or left at the office of a Secretary to the Local Government or the Collector of the District, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left." The language used by the legislature is perfectly plain. No doubt, section 80 does not require that a notice thereunder shall be signed by all the plaintiffs; but it is essential that the notice should state the names, descriptions and places of residence of all the plaintiffs. In the case before us, the names, descriptions and places of residence of two out of sixty-three plaintiffs were given; this was obviously insufficient. It has been urged that, as stated in *The Secretary of State for India v. Perumal Pillai* (1), the object of section 80 is to give the defendant an opportunity of settling the claim, if so advised, without litigation, or, as observed by this Court in the case of *Manindra Chandra Nandi v. The Secretary of State for India* (2), the object of the notice is to enable the Secretary of State to have an opportunity to investigate the alleged cause of complaint and to make amends, if he thought fit, before he was impleaded in the suit. This object would be completely frustrated if it was maintained that a notice which contained the names, descriptions and places of residence of some only of the plaintiffs in the suit was sufficient. The Secretary of State cannot very well be expected to speculate, or ascertain by enquiry, who the possible plaintiffs might be. We cannot

1912  
 BHOLA  
 NATH ROY  
 v.  
 SECRETARY  
 OF STATE  
 FOR INDIA

(1) (1900) I. L. R. 24 Mad. 279. (2) (1907) 5 C. L. J. 148.

1912

BHOLA  
NATH ROY  
v.  
SECRETARY  
OF STATE  
FOR INDIA.

hold, in view of the express provision of section 80, that the notice in this case, which gave the names of two out of sixty-three plaintiffs, fulfilled the requirements of the statute. The first ground, therefore, fails.

In so far as the second ground is concerned, it is clearly well founded and must succeed. As we have already observed, although, in the first paragraph of the written statement of the Secretary of State for India in Council, an objection was taken to the validity of the notice, no issue was raised upon the point. We must assume that the issues were framed in the presence of the parties or their representatives. At any rate, they had notice of the date when the issues would be settled by the Court, and it was incumbent upon them to be represented on the occasion. But even if it be assumed that the issues were framed in the absence of the Government Pleader, it is plain that he might have taken exception to the issues as framed and asked the Court to frame an additional issue. No objection, however, was taken by him at any stage of the trial in the Court of first instance. It was the second defendant who prayed, just before the trial began, that an additional issue might be raised upon the question of the validity of the notice. But it was clearly incompetent to the second defendant to raise the question. As was pointed out by this Court in *Manindra Chandra Nandi v. The Secretary of State for India* (1), it is competent to the Secretary of State to waive the notice, and he may be estopped by his conduct from pleading the want of notice at a late stage of the trial. In the events which have happened, we are clearly of opinion that in this case notice was waived on behalf of the Secretary of State, and that the question could not have been raised

by the second defendant. The second ground, therefore, must prevail.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that the appeal may be heard on the merits. The appellants are entitled to their costs in this Court. Under section 13 of the Court-fees Act we direct that the amount of Court fees paid on the memorandum of appeal be returned to the appellants. The plaint, which was returned by order of the District Judge to the plaintiffs, will be received and sent down to the Court below.

O. M.

*Appeal allowed ; case remanded.*

## CRIMINAL REVISION.

*Before Sharfuddin and Coxe JJ.*

RAM ANGUTHA SINGH

*v.*

EMPEROR.\*

1912

BHOLA  
NATH ROY  
*v.*  
SECRETARY  
OF STATE  
FOR INDIA.

1913

Jan. 3.

*Cumulative Sentences—Rioting—Separate sentences for rioting and causing hurt—Penal Code (Act XLV of 1860) ss. 147, 323.*

Separate sentences for the offences of rioting and hurt are legal where it is found that each person took an individual part in the assault.

*Nilmony Poddar v. Queen-Empress* (1), *Mohur Mir v. Queen-Empress* (2), *Ferasat v. Queen-Empress* (3) *r ferred to*.

THE facts of the case are shortly these. The petitioners are police constables attached to the Cossipore Gun and Shell Factory and the complainant

\* Criminal Revision No. 1529 of 1912, against the order of H. P. Duval, Sessions Judge of Alipore, dated Sept. 20, 1912, confirming the order of A. K. M. Abdus Subhan, Deputy Magistrate of Sealdah, dated Aug. 31, 1912.

(1) (1889) I. L. R. 16 Calc. 442. (2) (1889) I. L. R. 16 Calc. 725.

(3) (1891) I. L. R. 19 Calc. 105.

1913  
—  
RAM  
ANGUTHA  
SINGH  
v.  
EMPEROR.

is the head-constable under whom they worked. It appears that for some time past they had been slack and careless in their duties. They were, therefore, reported against by the complainant and were departmentally punished. The petitioners, thereupon, along with others, conspired together to assault the complainant and did assault him on the 16th of May, 1912, at about 1 A.M. while he was asleep in the guard-room.

The petitioners were put upon their trial before the Deputy Magistrate of Sealdah under sections 147 and 323 of the Indian Penal Code. The learned Deputy Magistrate found them all guilty under section 147 of the Indian Penal Code, and sentenced them to six months' rigorous imprisonment and a fine of Rs. 50 each. In addition to the punishment under section 147, he sentenced the petitioners Nos. 1, 2 and 3 under section 323 of the Indian Penal Code to a further period of three months' rigorous imprisonment.

They appealed to the Sessions Judge of the 24-Pergannahs who dismissed the appeal on the 20th of September, 1912. Against this order of the Sessions Judge they moved the High Court and obtained this Rule.

*Babu Manmatha Nath Mookerjee and Babu Sivanandan Roy*, for the petitioner.

*The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown.

SHARFUDDIN AND COXE JJ. This was a Rule issued to the District Magistrate of the 24-Pergannahs to show cause why the sentences passed, under section 323 of the Indian Penal Code, on the first three petitioners, should not be set aside, on the ground that separate sentences could not be passed against them under both the sections 147 and 323 of the Indian Penal Code.

The three petitioners referred to above have been convicted under section 147 of the Indian Penal Code, and have each been sentenced to rigorous imprisonment for six months and to pay a fine of Rs. 50. They have also been convicted under section 323 of the Indian Penal Code and each sentenced to a further term of three months' rigorous imprisonment. Objection is taken by them that the separate sentences under sections 147 and 323 of the Indian Penal Code are illegal; and reference is made to the Full Bench ruling in the case of *Nilmony Poddar v. The Queen Empress* (1), where it was held that separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not cause hurt, but were guilty of that offence under section 149 of the Indian Penal Code. In the present case, however, there is a distinct finding that each of the three petitioners took an individual part in the assault. The Full Bench ruling above cited does not, therefore, avail them. There is another case, namely, that of *Mohur Mir v. The Queen-Empress* (2) where it was held that separate terms of imprisonment under sections 147 and 323 of the Indian Penal Code would be legal if the men thus convicted had individually caused hurt. There is another case to the same effect, namely, the case of *Ferasat v. The Queen-Empress* (3) in which also it was held that under the above circumstances separate sentences are legal. In this last case the effect of the case of *Nilmony Poddar v. The Queen Empress* (1) was explained.

In these circumstances, we are unable to interfere with the separate sentences passed on the first three petitioners; and we accordingly discharge this Rule.

S. K. B.

*Rule discharged.*

(1) (1889) 1. L. R. 16 Calc. 442. (2) (1889) 1. L. R. 16 Calc. 725

(3) (1891) 1. L. R. 19 Calc. 195.

1913  


---

 RAM  
 ANGUTHA  
 SINGH  
 v.  
 EMPEROR.

## APPELLATE CIVIL.

1913

Jan. 3.

*Before Holmwood and Chapman J.*

MAKBUL ALI

v.

ALI AHMAD.\*

*Interest—Usufructuary mortgage—Interest not stipulated for—Charge in the nature of mortgage must be in writing and registered.*

Where no interest is stipulated for in a mortgage bond no interest is recoverable. A charge in the nature of mortgage, whether for principal or interest, must be expressed in writing and registered, and cannot be raised by implication.

*Kuttiamma v. Madhava Menon* (1) followed.

*Imdul Hasan Khan v. Badri Prasad* (2) distinguished.

SECOND APPEAL by Makbul Ali, the defendant.

This appeal arose out of a redemption suit. The plaintiffs alleged that the disputed land belonged to their uncle, one Rakimuddin, who mortgaged it to the defendant No. I by a usufructuary mortgage bond dated 17th Magh, 1260, and that the defendant No. I was still in possession of the land; that Rakimuddin was dead; that the plaintiffs were his only heirs and that in spite of repeated requests to receive the mortgage money the defendant No. I had refused to accept the money.

Defendant No. I contended that Manirullah was not the next friend of the minor plaintiffs; that the plaintiffs had no right to the land in dispute; that it

\* Appeal from Appellate Decree, No. 170 of 1911, against the decree of Rajani Kanta Chatterjee, Additional Subordinate Judge of Chittagong dated Nov. 8, 1910, modifying the decree of Kunja Behari Ghosh, Munsif of Patiya, dated June 22, 1910.

(1) (1901) 11 Mad. L. J. 186.

(2) (1898) I. L. R. 20 All. 401.



was sold for the debt of their predecessor, and one Sachiram had purchased it in the auction sale; that the boundaries were incorrect; that he never possessed the mortgaged land but Rakimuddin had kept it in his possession by executing a kabuliyat in 1260 M.E.; that he did not get any profit since 1264 M.E. and that without paying Rs. 56 as profits from 1264 to 1271 the plaintiffs could not redeem; and that Manirullah could not be the next friend of the minor plaintiffs.

1913  
MAKBUL ALI  
v.  
ALI AHMAD.

Sachiram was subsequently made a defendant and he disclaimed his right to the land in suit. He submitted that he made the auction purchase with the minors' money and for their benefit.

The learned Munsif, who tried the case, held that the plaintiffs were entitled to redeem the mortgaged land on payment of Rs. 42 and he accordingly decreed the suit with costs against defendant No. I.

The defendant No. I then appealed to the Additional Subordinate Judge of Chittagong who dismissed the appeal.

Against that order of the Additional Subordinate Judge the defendant preferred this second appeal.

*Babu Dharendra Lal Kastgir*, for the appellant.

*Babu Prabodh Kumar Das*, for the respondent.

HOLMWOOD AND CHAPMAN JJ. This second appeal arises out of a suit for redemption brought by the mortgagor plaintiff against the mortgagee defendant. The plaintiff mortgaged his property by way of usufructuary mortgage to the defendant, and a month afterwards obtained a lease from him for one year at the rental of 8 rupees a year. There was no stipulation in the usufructuary mortgage bond for any interest; and although the lease recites that there had been a mortgage there is no charge made on the property by

1913  
 MAKBUL ALI  
 v.  
 ALI AHMAD.

the lease for the rent annually due upon it. The Courts below have, therefore, found that the redemption may be had on payment of the principal only, and have allowed no interest.

The defendant appeals on the ground that the plaintiff is not entitled to redeem without payment of principal and interest. He argues this point in three ways: *first*, he maintains that the decree should be one for account; *secondly*, that on a construction of both the documents the transaction was a single one and the plaintiff is bound to pay interest at the rate set out as rental in the lease; and, *thirdly*, that in any case a Court of equity should give the defendant some usufruct or interest in the circumstances of this case. The ruling in *Imdad Hasan Khan v. Badri Prasad* (1) is relied upon, as it was relied upon before the learned Subordinate Judge, and the ruling in *Kullyan Dass v. Sheo Nundun Purshad Singh* (2) is also cited before us as authority that an account should be taken.

The learned Subordinate Judge has distinguished the Allahabad case from this case, and we think rightly. In that case the two documents referred to each other and there was a clear stipulation that the rent in the lease should be taken as interest upon the mortgage. In this case there is no such express reference and no such stipulation and the case seems to us to be precisely on all fours in this respect with the case of *Kuttiumma v. Madhava Menon* (3). Two very important principles of law which govern this case were laid down in that case by Shephard and Boddam JJ. The first is that where no interest is stipulated for in a mortgage bond no interest is recoverable. The second is that a charge in the nature

(1) (1898) I. L. R. 20 All. 401.      (2) (1872) 18 W. R. 65.

(3) (1901) 11 Mad. L. J. 186.

of mortgage whether for principal or interest must be expressed in writing and registered and cannot be raised by implication. In that case the usufructuary mortgagee leased the mortgage lands to the mortgagor for one year, and a registered deed executed by the mortgagor made a charge upon the land for arrears of rent, which makes the Madras case a much stronger case than this, and the mortgagee paid no rent but held over after the lapse of the period; it was however held that the rent was not recoverable as interest due on the mortgage. It is true that this was a suit by the mortgagee for the mortgage money and for arrears of rent, and in the issue the Courts gave the plaintiff a decree for three years' rent which was not barred by limitation. But it is impossible for us even though we may hold that the defendant is equitably entitled to such rent to give it to him in this suit. He must bring a suit properly framed for the purpose, in order to have it determined what rent, if any, he can recover under the terms of the lease. It is clear that he cannot recover any rent as interest on the mortgage and that he is subject to the ordinary rules of limitation as regards the amount of rent recoverable. It could not therefore be within the scope of this proceeding to order an account to be taken and the equities between the parties decided.

For these reasons, we think that the appeal fails and must be dismissed with costs.

S. K. B.

*Appeal dismissed.*

1913

MAKBUL ALI

v.

ALI AHMAD.

## CIVIL RULE.

*Before Chitty and Tennon JJ.*

1913

Jan. 13.

KARTIK CHANDRA OJHA

v.

GORA CHAND MAHTO.\*

*High Court, Jurisdiction of—Chota Nagpur Tenancy Act (Beng. VI of 1908) s. 27—Application for enhancement of rent—Jurisdiction of the High Court to set aside an order of Deputy Commissioner passed without jurisdiction, on appeal from an order of Deputy Collector—Judicial proceeding.*

Proceedings on applications for enhancement of rent under section 27 of the Chota Nagpur Tenancy Act are judicial proceedings, and Deputy Commissioners in the performance of their judicial duties under the Act are Courts subject to the appellate jurisdiction of the High Court.

The High Court has jurisdiction to interfere in cases where the Courts of Collectors have either exceeded the jurisdiction or failed or refused to exercise the jurisdiction vested in them by the Chota Nagpur Tenancy Act.

*Chaitan Patgosi Mahapatra v. Kunja Behari Patnaik* (1) referred to.

RULE granted to the petitioners, Kartik Chandra Ojha and others.

The petitioners made an application for enhancement of rent of the holdings of the tenants (opposite party) under section 27 of the Chota Nagpur Tenancy Act, in the Court of the Deputy Collector, Purulia. The opposite party took various objections to the application of the petitioners, but the learned Deputy Collector overruled the objections, and made an order enhancing the rent of the tenants. Against this order

\* Civil Rule No. 4910 of 1912, against the order of G. Milne, Deputy Commissioner of Manbhum, dated June 7, 1912.

the tenants preferred an appeal to the Deputy Commissioner who dismissed the petitioners' application, on the ground that the questions at issue should be decided only "after a full and fair trial" or "by the Settlement Department in the villages." Against this order the petitioners moved the High Court and obtained this Rule.

1913  
KARTIK  
CHANDRA  
OJHA  
v.  
GORA CHAND  
MAHTO.

*Babu Karunamoy Ghose*, for the opposite party, took a preliminary objection that the High Court had no jurisdiction to interfere in proceedings which arose out of applications for enhancement of rent under section 27 of the Chota Nagpur Tenancy Act. The Chota Nagpur Tenancy Act (Beng. VI of 1908) being a complete Code in itself, the Courts are to be guided by the procedure laid down therein: see *Radha Madhub Santra v. Lukhi Narain Roy Chowdhry* (1) and *Nogendro Nath Mullick v. Mathura Mohun Parhi* (2). The High Court cannot revise orders passed by Courts of Collectors, under section 115 of the new Code of Civil Procedure: see *Raghubar Sahi v. Protap Uday Nath Sahi Deo* (3). In the Chota Nagpur Tenancy Act, suits and applications are not interchangeable terms: see *Khetra Nath Ghatak v. Piru Bamri* (4). Therefore, the High Court has no jurisdiction to interfere in proceedings based on applications, under section 15 of the Charter Act, by which it is vested with power of superintendence over Courts subject to its appellate jurisdiction, and only in cases of suits and appeals. No appeal lies to the High Court in cases of applications under the Act. The Board of Revenue and the Commissioner have the power of superintendence over the Courts of Collectors: see sections 216, 264 and 274 of the Act. The cases under

(1) (1893) I. L. R. 21 Calc. 428.

(3) (1911) I. L. R. 39 Calc. 241.

(2) (1891) I. L. R. 18 Calc. 368.

(4) (1911) 13 C. L. J. 250.

1913  
 KARTIK  
 CHANDRA  
 OJHA  
 v.  
 GORA CHAND  
 MAHTO.

Act X of 1857 in which the High Court interfered under section 15 of the Charter Act, are distinguishable, as they related to suits and not to applications. In any case the petitioners ought to have gone to the Commissioner first, before coming to the High Court. The case falls under section 76 cl. (10) of the Act, and the order of Deputy Commissioner is final.

*Babu Bepin Behary Ghose*, for the petitioners. The orders passed by the Deputy Commissioner under the Act are those of a Civil Court and second appeals are allowed in certain cases to the High Court, so he is subject to the appellate jurisdiction of the High Court, which has therefore power to interfere with the orders of the Deputy Commissioner under section 15 of the Charter Act: see *Nilmoni Singh Deo v. Tara Nath Mukerjee* (1). It is immaterial that no appeal is allowed by the Act from certain orders, for in cases where an appeal is allowed there would be no occasion for an application for revision. It is true that powers have been conferred by the Act on the Commissioner and the Board of Revenue by section 217 to revise certain orders, but that provision cannot deprive the High Court of its jurisdiction, nor could it be so intended. There were similar provisions under sections 151 and 152 of Act X of 1859, but the High Court never refused jurisdiction to entertain applications for revision in such cases: see *Chaitan Patgosi Mahapatra v. Kunja Behari Patnaik* (2). There can be no doubt that the order complained against was one in which the learned Deputy Commissioner failed to exercise the jurisdiction vested in him by law.

*Cur. adv. vult.*

CHITTY AND TEUNON JJ. In this case the landlord petitioners made an application under section 27 of

(1) (1882) I. L. R. 9 Calc. 295.

(2) (1911) I. L. R. 38 Calc. 832.

the Chota Nagpur Tenancy Act (Bengal Act VI of 1908) for the enhancement of the rent paid by the tenants opposite-parties in respect of their holding.

The application was heard by a Deputy Collector empowered to discharge the functions of a Deputy Commissioner under section 27 and the following sections of the Act. After a prolonged enquiry the Deputy Collector on the 12th February, 1912, made an order enhancing the rent of the tenants from Rs. 2-8 to Rs. 32-10-5 per annum. Against this order the tenants preferred an appeal under the provisions of section 215 (1) (iv) to the Deputy Commissioner who, after commenting on the proceedings of the Deputy Collector in terms which should not find a place in the judgment of any Court, dismissed the landlords' application on the ground that in his opinion the questions at issue should be decided only "after a full and fair trial" or "by the Settlement Department in the village."

It is not suggested that in the area with which we are here concerned any order for the preparation of a record-of-rights had been issued, and obviously if in the opinion of the Deputy Commissioner the case had not been fully and fairly tried his proper course was to make or direct such further inquiry as might be necessary.

It therefore cannot be and has not been disputed before us that in omitting to deal with the appeal before him on the merits the Deputy Commissioner has failed to exercise a jurisdiction vested in him by law. But on behalf of the tenants opposite-parties it has been contended that the Courts of Deputy Commissioner when dealing with applications for the enhancement of rent under the provisions of sections 27 to 30 of the Chota Nagpur Tenancy Act are not Courts subject to the appellate jurisdiction of

1913

KARTIK  
CHANDRA  
OJHA"GORA CHAND  
MAHTO.

1913

KARTIK  
CHANDRA  
OJHA  
v.GORA CHAND  
MAHTO.

this Court within the meaning of section 15 of the Indian High Courts Act 1861, that superintendence over Deputy Commissioners in the performance of their duties under the Act is by its express provisions vested in the Commissioner and the Board of Revenue and that, therefore, this Court has no jurisdiction, or at least should not interfere.

These contentions are based on the provisions of section 215(2) (which in terms relates to suits only), section 217 and section 270 of the Act.

From the very nature of the proceedings themselves, and also from the provisions of the Act as contained, for instance, in Chapter XVI it is clear that proceedings on applications for enhancement of rent are judicial proceedings, and in view of the express provisions of section 224 (2) which allows in certain cases a second appeal to this Court, it cannot in our opinion be contended that Deputy Commissioners in the performance of their judicial duties under the Chota Nagpur Tenancy Act are not Courts subject to the appellate jurisdiction of this Court.

No doubt, by the provisions of the sections we have already cited, powers of revision, direction and control are vested in the Commissioner and the Board of Revenue. But these sections merely reproduce in practically identical terms the provisions of sections 151 and 152 of Act X of 1859, and notwithstanding the existence of these provisions in that Act, this Court in a long series of decisions [we need here refer only to the case of *Chaitan Patgosi Muhapatra v. Kunja Behari Patnaik*(1)], has held that it has jurisdiction and has interfered in cases where the Courts of Collectors have either exceeded the jurisdiction or failed or refused to exercise the jurisdiction vested in them by the said Act.



We are therefore of opinion that in the present case we have jurisdiction and should interfere.

We accordingly make this Rule absolute, set aside the order of the Deputy Commissioner dated the 7th June, 1912, and direct him to proceed with and determine the appeal before him on the merits.

We make no order as to costs.

S. C. G.

*Rule absolute.*

1913

KARTIK  
CHANDRA  
OJHA

v.

GORA CHAND  
MAHTO.

## ORIGINAL CIVIL.

*Before Fletcher J.*

GREY

v.

LAMOND WALKER.\*

1913

Jan. 29

*Sale of goods—insolvency of purchaser before delivery—Vendor's right to refuse delivery—Official Assignee, duties and rights of—Election within reasonable time—Tender of cash before delivery—Presidency Towns Insolvency Act (III of 1909) ss. 52, 62, 64—Joint Hindu family, insolvency of member of—Infant partner—Contract Act (IX of 1872) s. 247.*

On the insolvency of the *karta* of a *mitakshara* Hindu family, a suit is not maintainable by the Official Assignee for damages for breach of a contract entered into by the firm, which was the joint business of the family.

Under section 52 of the Presidency Towns Insolvency Act, the rights that passed to the Official Assignee were the rights the insolvent had under the contract *as an insolvent*: hence, it was the duty of the Official Assignee to declare his election to take up the contract within a reasonable time, and to tender cash before calling for delivery.

*Ex parte Chalmers* (1) and *Morgan v. Bain* (2) followed.

\* Original Civil Suit No. 689 of 1912.

(1) (1873) L. R. 8 Ch. App. 289. (2) (1874) L. R. 10 C. P. 15.

1913

GREY  
v.  
LAMOND  
WALKER.

## ORIGINAL SUIT.

This suit was instituted by Mr. C. E. Grey as Official Assignee of the property of Gurmukh Roy Kadia, an insolvent, for the recovery of Rs. 3,199-2-9 as damages for failure to deliver under two contracts for the sale of sugar. The contracts, both dated the 15th August 1910, were entered into between the firm of Messrs. Walker, Goward & Co., of which the defendant Mr. Lamond Walker was a member, and the firm of Messrs. Gurmukh Roy Ramessur, and were each for the sale by the former firm to the latter, of 50 tons of Java sugar for shipment from July to October 1911, in equal instalments of  $12\frac{1}{2}$  tons each, each shipment to be treated as a separate contract, and the terms being "cash before delivery as customary."

On the 15th June, 1911, Gurmukh Roy Kadia was adjudicated an insolvent on his own petition, and a vesting order was made, vesting his property in the plaintiff. In the adjudication order Gurmukh Roy Kadia was described as carrying on business under the style of Gurmukh Roy Ramessur. The goods arrived in Calcutta in the months of July, August, November and October, respectively, in respect of the one contract, and in the months of July, August, September and October, respectively, in respect of the other.

No notice of arrival of any of the goods was given by the defendants to the plaintiff, and the plaintiff took no steps for the purpose of completing the contracts till the 13th September, 1911, on which date he wrote to the defendants in respect of the July and August shipments, in these terms:—"I have to give you notice that you have not yet sent me an arrival notice in terms of the above contracts. I am at present prepared to pay for and take delivery of the goods, on

your tendering the same for the above shipments." At no time did the plaintiff tender to the defendants the price of any portion of the goods.

The defendants replied, on the 21st September, 1911, that they had "already disposed of the sugar under the contract." This was confirmed by a further letter of the 9th November, 1911. On the 26th April, 1912, the plaintiff obtained leave from the Court, in its Insolvency Jurisdiction, to institute proceedings, and on the 13th June claimed from the defendants, on behalf of the insolvent's estate, the sum of Rs. 3199-2-9, being the difference between the contract rates and the rates prevailing on due dates, for their failure to deliver the sugar sold under the contracts. On the defendants repudiating all liability, this suit was instituted.

The averment of breach in the plaint was in these terms:—"The plaintiff was at all times ready and willing to take delivery and pay for the said sugar in terms of the said agreements, but the defendants, in breach of the said agreements, failed and neglected to deliver any of the sugar."

In their written statement, the defendants put in issue the proprietorship of the firm of Gurmukh Roy Ramessur by the insolvent; and contended that they were justified, in the circumstances, in not delivering any of the goods under the contract.

The following issues were settled between the parties:—

(i) Was the insolvent the sole proprietor of the firm of Gurmukh Roy Ramessur?

(ii) Did the plaintiff or the insolvent ever tender cash before calling upon the defendants to deliver the goods: if not, is the plaintiff entitled to call upon the defendants to deliver?

1913  
GREY  
v.  
LAMOND  
WALKER.

1913

GREY

v.

LAMOND  
WALKER.

(iii) Was the plaintiff bound to express his readiness and willingness to perform the contract in suit within a reasonable time of the insolvency?

(iv) Was the plaintiff in fact ready and willing to perform the contract?

(v) Did the defendants, by stating in their letter of the 21st September, 1911 that they had already sold the sugar, refuse to give delivery and commit a breach of the contract?

In respect of the first issue, it appeared from the evidence that the insolvent was the *kurta* of a *mitakshara* Hindu family, and was joint with his grandson Ramessur, who was an adult, and that the business of the firm of Gurmukh Roy Ramessur formed part of the joint family estate.

It was not disputed that the market was a rising one, and that the rates prevailing on the dates of delivery were higher than the contract rates.

*Mr. B. C. Mitter* (with him *Mr. N. N. Sircar*), for the defendants. It is clear from the evidence that the insolvent was not the sole proprietor of the firm of Gurmukh Roy Ramessur: the insolvent was joint with his grandson Ramessur, and the business formed part of the joint family estate. It follows that the Official Assignee, in whom vested the property only of the insolvent, cannot maintain this suit. In the circumstances the defendants were justified in not making delivery under the contracts. On the insolvency of Gurmukh Roy, the Official Assignee was not entitled to delivery, unless and until he first made tender of the price: *Ex parte Chalmers* (1), *Morgan v. Bain* (2), *Ex parte Stapleton* (3). No tender of cash was made by the Official Assignee. These authorities also show

(1) (1873) L. R. 8 Ch. App. 289. (2) (1874) L. R. 10 C. P. 15.

(3) (1879) L. R. 10 Ch. D. 586.

that an election to fulfil the contract must be made within a reasonable time. There had been unreasonable delay by the Official Assignee: his letter of the 13th September was too late.

1913  
GREY.  
v.  
LAMOND  
WALKER.

*Mr. Pugh* (with him *Mr. Langford James*), for the plaintiff. The evidence shows that Ramessur was an infant. Assuming that the business was part of the joint estate, this suit could have been brought by Gurmukh Roy alone previous to his insolvency and hence is now maintainable by the Official Assignee. An infant cannot enter into or sue on a contract: as regards third parties, he has not the status of a partner: it may be, after decree, the infant may have his rights against the Official Assignee for a share in the profits: see section 247 of the Contract Act. It is submitted Ramessur is not a necessary party: if it be held otherwise, let him be added as a party to this suit. It is a well established principle that the insolvency of one of the contracting parties does not put an end to the contract. There has been no disclaimer by the Official Assignee: see sections 62 and 64 of the Insolvency Act of 1909—nor was any application made under section 65 to the Court to rescind the contract. Hence the contract was a subsisting one. The authorities cited on behalf of the defendants have no application to this case, where provision was made in the contracts for cash before delivery. The defendants failed to give arrival notices, as they were bound to do. When called upon to make delivery, they admitted they had disposed of the goods: this was a clear breach. It was unnecessary thereafter for the Official Assignee to tender cash: *Tolhurst v. Associated Portland Cement Manufacturers* (1), *In re Phoenix Bessemer Steel Co.* (2).

1913  
GREY  
v.  
LAMOND  
WALKER.

The Official Assignee was at all times ready and willing to fulfil his part of the contract, namely, to pay cash before delivery. The market was a rising one and the defendants have pocketed the profits.

FLETCHER J. In this suit Mr. Charles Edward Grey, the Official Assignee of Bengal, and as such assignee of the property of Gurmukh Roy Kadia, an insolvent, sues three gentlemen who carry on business in copartnership together under the style of Messrs. Walker, Goward & Co. to recover Rs. 3,199-2-9 as damages in respect of a breach of two contracts for the sale of sugar. The contracts were both dated the 15th of August 1910, and were both for the sale of 50 tons of Java sugar delivered over July, August September and October, 1911, by instalments of 12½ tons each month.

On the 15th of June, 1911, Gurmukh Roy Kadia was adjudicated an insolvent, he being in the adjudication order described as carrying on business under the style of Gurmukh Roy Ramessur, and no steps were taken by the Official Assignee until the 13th of September, 1911, for the purpose of completing these contracts. On the 13th of September, 1911, Mr. Grey wrote to the defendants in these terms: "I have to give you notice that you have not yet sent me the arrival notice in terms of the above contracts. I am at present prepared to pay for and take delivery of the goods, etc., etc." No notice had been given of the arrival of any goods by the defendant to Mr. Grey. It appears from the evidence that the first lot of the July goods did not arrive here until August. That appears from the evidence given on behalf of the defendants.

The following issues were settled between the parties :—(i) Was the insolvent the sole proprietor

of the firm of Gurmukh Roy Ramessur? (ii) Did the plaintiff or the insolvent ever tender cash before calling upon the defendants to deliver the goods; if not, is the plaintiff entitled to call upon the defendants to deliver? (iii) Was the plaintiff bound to express his readiness and willingness to perform the contract in suit within a reasonable time of the insolvency? (iv) Was the plaintiff, in fact, ready and willing to perform the contract? (v) Did the defendants, by stating in their letter of 21st September, 1911, that they had already sold the sugar, refuse to give delivery and commit a breach of the contract?

1913  
GREY  
v.  
LAMOND  
WALKER.  
FLETCHER J.

On the first issue the evidence stands in this way. The insolvent, Gurmukh Roy, is a member of a *mitakshara* Hindu family; he is in fact the *kurta* of the family. He had two sons, both of whom are deceased, and the eldest grandson (it matters not for this purpose whether he is an adopted son of the deceased's son or a natural born son) is Ramessur; and, in accordance with the usual practice adopted amongst Hindus who belong to this school of Hindu law, the firm is carried on in the name of the *kurta* of the family, Gurmukh Roy, and in the name of the eldest grandson, Ramessur.

There cannot be any doubt in cases of families of this nature that there is a presumption of jointness, not only of their property, but even as regards business which they carry on, and if any member sets up that a particular portion of the property forms his *peculium*, or separate property, the *onus* of proving that lies on the particular member who sets up that case. It seems to me in this case that the Official Assignee has got the rights of Gurmukh Roy, and no one else, and the *onus* is upon him to show that this business was in fact a separate business of Gurmukh Roy.

1913

GREY

v.

LAMOND  
WALKER.

FLETCHER J.

Now, how does the evidence stand as regards that? It is obvious on the evidence given on behalf of the Official Assignee that out of the profits of this business, and without any separate account being kept of those profits, there was paid on account of Ramessur, not only his food and raiment, but also the expenses of his performing acts of worship suitable and proper to the religion which he professes. That cannot be doubted. There is a charge for a supper for Ramessur on arriving in Calcutta, and on several other occasions a charge for his raiment and a charge for performing the religious ceremony of worshipping the "Mother Ganges." It seems to me, on that, quite clear that the business does form a portion of the joint family estate.

Then, it is said that Ramessur is an infant and, therefore, the only right he can have is a right to have such portion of the assets which remained after paying the creditors in full handed over to him. That is not this case at all. What you have to consider in this case is, what is the title of the Official Assignee? The title of the Official Assignee is not open to doubt, because, under section 52 of the Presidency Towns Insolvency Act, the title of the Official Assignee is to all such property which may belong to, or be vested in, the insolvent at the commencement of the insolvency, but excluding all property which was held by the insolvent on trust or for any other person. It is quite obvious on that section that the Official Assignee stands exactly in the same position as the insolvent, except that where the insolvent held the property, not only for himself, but on trust for other members of the family, the portion thereof which was held by the insolvent as a trustee does not pass to the Official Assignee. It seems to me on the construction of the Act that is quite clear.



It is then said that under section 247 of the Indian Contract Act the suit can be maintained by Gurmukh Roy, as the *kurta* of the family, for any obligations entered into on behalf of the business. That may be so as regards Gurmukh Roy; but the Official Assignee is not Gurmukh Roy, and he is not a member of the joint Hindu family. The Official Assignee's rights are to such portions of the joint family estate as Gurmukh Roy was entitled to in his own right. It has nothing to do with the other members of this joint Hindu family.

I am satisfied that Ramessur was not in fact an infant. The evidence is that he is about 24 or 25 years of age; at least, that is the evidence which I accept. That Ramessur is anything like 13 or 14 years of age I do not believe, and the proceedings in the Small Cause Court, both of the plaint filed by the firm and of the written statement filed against the firm, make no mention that Ramessur was an infant.

I therefore find the first issue in favour of the defendants, namely, that Gurmukh Roy was not in fact the sole proprietor of the firm of Gurmukh Roy Ramessur.

The second issue is, what are the rights of the Official Assignee, with regard to contracts of this nature, upon the happening of an insolvency? A good deal has been said on the disclaimer sections, sections 62 to 64. This is not a case of a disclaimer at all. The question is, what, under section 52, were the rights which passed to the Official Assignee upon the insolvency of Gurmukh Roy. It seems to me quite clear that the rights that passed to the Official Assignee were not the rights of Gurmukh Roy as a solvent, but the rights that he had under the contract as an insolvent, that is, as a person declaring his inability to comply with the terms of the contract, and therefore

1913

GREY

v.

LAMOND  
WALKER.

FLETCHER J

1913

GREY

v.

LAMOND  
WALKER.

FLETCHER J.

it was the duty of the Official Assignee, upon requiring the completion of the contract, that he should offer to complete the contracts in the way that the insolvent was bound to complete them, namely, that he should make a tender of cash before calling upon the vendor to deliver under the terms of the contract. In my opinion, the decision of Lord Selborne, when Lord Chancellor, and Lord Justices James and Mellish in *Ex parte Chalmers* (1) is conclusive on that matter. That is also in accordance with the decision of the Court of Common Pleas, in *Morgan v. Bain* (2). In my opinion, the Official Assignee was only entitled under the terms of the contract, and, having regard to the insolvency of Gurmukh Roy, to take up the same position that Gurmukh Roy could have done.

Then, passing to the third issue, I think that the decisions in *Ex parte Chalmers* (1) and in *Morgan v. Bain* (2) show that the Official Assignee must declare his election to take up the contracts on the terms that I have mentioned, namely, that he should stand in the shoes of the insolvent, *quâ* insolvent, within a reasonable time. In my opinion, the defendants were not bound to take any steps in regard to these contracts, unless and until they heard from the Official Assignee that he elected to take up the contracts on those terms, and, until he did so elect, they were entitled to remain quiet with regard to any of the matters required to be done under the contract. On the 13th of September, 1911, when the Official Assignee first gave notice to the defendant that he intended to take up the contracts, I think he was much too late in declaring his election. In a case like this, where the adjudication happened as long ago as the 15th of June, 1911, it would be intolerable that a mercantile firm should have to wait from the 15th of June to the 13th September to

(1) (1873) L. R. 8 Ch. App. 289.

(2) (1874) L. R. 10 C. P. 15.

find out whether the Official Assignee intended to elect to take up the contracts or not. It may be that in that time Messrs. Walker, Goward & Co. might have considered it necessary, though there is no evidence that they did in this case, to cancel on the best terms that they could the contracts that they had made in Java with respect to the sugar. In my opinion, the election declared in the letter of the 13th September, 1911, was far too late, and was not made within a reasonable time. That being so, the other two issues suggested by the counsel for the Official Assignee do not in fact arise, because in my opinion the Official Assignee did not declare within a reasonable time that he intended to take up the contract, and the defendants were entitled to assume that the Official Assignee intended to abandon it. The decisions I have cited above show that if the Official Assignee had elected to take up the contracts it was his duty to tender cash to the defendants before requiring the defendants to deliver the goods to him. It is admitted he did not do this. The present suit, therefore, fails, and must be dismissed with costs on scale No. 2.

J. C.

*Suit dismissed.*Attorneys for the plaintiff: *Leslie & Hinds.*Attorneys for the defendants: *B. N. Bose & Co.*

1913

GREY

v.

LAMOND  
WALKER.

FLETCHER J.

**APPELLATE CIVIL.***Before Chitty and Teunon JJ.*

1913

Jan. 24.

LAKSHMI BIBI KUJRANI

v.

ATAL BIHARY HALDAR.\*

*Mortgage—Sale—Chota Nagpur Tenancy Act (Beng. VI of 1908) s. 47  
—Decree for sale of property situate in Manbhum—Estoppel.*

After the preliminary decree on a mortgage was passed, and before the final decree for sale was made, the Chota Nagpur Tenancy Act, 1908, was extended to Manbhum, where the mortgaged property was situate. The judgment-debtor having objected to the application of the decree-holder for sale of the said property, both Courts set aside the objection, and the sale to the decree-holder was thereafter confirmed. Upon appeal to the High Court :—

*Held*, that the sale was in direct contravention of the provisions of s. 17 of the Chota Nagpur Tenancy Act.

*Held*, further, that the judgment-debtor cannot be estopped from bringing to the notice of the Court what the Court must be taken to know of itself, that there was a distinct provision of law which prevented the sale of the property.

APPEAL by Lakshmi Bibi Kujrani, the judgment-debtor.

This was an appeal from an order refusing to set aside the sale of a certain mortgaged property. The facts are as follows. Lakshmi Bibi Kujrani, on the 1st January, 1907, executed a mortgage of her property situate in Manbhum in favour of one Atal Bihary Haldar. On the 15th June, 1909, the mortgagee

\* Appeal from Order, No. 169 of 1912, against the order of G. B. Mumford, District Judge of Manbhum, dated Dec. 22, 1911, affirming the order of Advaita Prasad De, Subordinate Judge of that district, dated June 15, 1911.

obtained a preliminary decree on the said mortgage and this decree was made final on the 26th November, 1910. In the meantime, pending the passing of this final decree, the Chota Nagpur Tenancy Act (Beng. VI of 1908) was extended to Manbhum. Upon the decree-holder applying for sale of the mortgaged property, the judgment-debtor filed her objection thereto. This objection was disposed of by the Court of first instance on the 15th June, 1911, in favour of the decree-holder, who had the property sold and purchased the same himself on the 22nd July, 1911. Subsequently, on the 22nd December, 1911, the order of the Court of first instance was upheld on appeal and on the 2nd May, 1912, the sale was confirmed. The judgment-debtor, thereupon, appealed to the High Court.

1913  
 LAKSHMI  
 BIBI  
 KUJRAHI  
 v.  
 ATAL  
 BIHARI  
 HALDAR.

*Babu Bepin Behary Ghose*, for the appellant.

*Babu Dwarka Nath Chuckerburty* and *Babu Mohini Mohan Chatterjee*, for the respondent.

CHITTY AND TEUNON, JJ. This is an appeal from an order of the District Judge confirming that of the Subordinate Judge of Manbhum, declining to set aside a sale. It appears that a mortgage was executed by the judgment-debtor on 1st January, 1907, in favour of the present decree-holder. On that mortgage, a preliminary decree was passed on 15th June, 1909, and the final decree for sale was passed on 26th November, 1910. In the interval between the two decrees the provisions of the Chota Nagpur Tenancy Act (Beng. VI of 1908) were extended to the district of Manbhum, and from that time they govern the property in question. The decree-holder asked for sale and the judgment-debtor objected. His objection was disposed of by the first Court on 15th June, 1911, and by the Appellate Court on 22nd December, 1911. It has been brought to our notice by the learned pleader for the

1913

LAKSHMI  
BIBI  
KUJRANI  
v.  
ATAL  
BIHARY  
HALDAR.

respondent that the sale actually took place on the 22nd July, 1911, while the appeal in the lower Court was pending, and that it was confirmed on 2nd May, 1912, while the appeal to this Court was pending. The purchaser in this case was the decree-holder.

The provisions of section 47 of the Chota Nagpur Tenancy Act put the matter beyond doubt. That section provides, subject to the three provisos which do not affect the present case, that no decree or order shall be passed by any Court for the sale of the right of a raiyat in his holding, nor shall any such right be sold in execution of any decree or order. The final decree which was passed on the extension of the Act ought not to have been passed; but, putting that aside, it is clear that the second portion of the section applies to this case, and prevents any such right being sold in execution of any decree or order.

For the respondent it has been argued that, the sale having taken place and been confirmed, it cannot now be questioned. But, having regard to the fact that the decree-holder is the purchaser and that the rights of third parties are in no way affected, it is clear that the Court, before which the appeal was pending ever since the objection of the judgment-debtor had been first made, could go into the question. The sale was in direct contravention of the provisions of section 47 of the Chota Nagpur Tenancy Act.

Secondly, it has been argued that the mortgagor is in some way estopped from saying that the property is not saleable. He cannot be estopped from bringing to the notice of the Court what the Court must be taken to know of itself, that there is a distinct provision of the law which prevents the sale of the property.

The appeal must be allowed. The orders of the lower Courts are set aside, with all the proceedings

which have taken place in consequence of those orders. The appellant must have his costs in all the three Courts.

O. M.

*Appeal allowed.*

1913  
 LAKSHMI  
 BIBI  
 KUJRAJI  
 v.  
 ATAL  
 BIHARI  
 HALDAR.

## APPELLATE CIVIL.

*Before Carnduff and Beacheroff JJ.*

INDRA CHANDRA MUKHERJEE

v.

SRISH CHANDRA BANERJEE.\*

1913  
 Jan. 30

*Appeal—Small cause case tried as an ordinary suit—Jurisdiction.*

Where a Judicial Officer invested with Small Cause Court jurisdiction tries suit, which he might have tried under the summary procedure, in the ordinary manner, the character of the suit is not thereby altered, and his decree is not appealable.

*Shankarbhai v. Somabhai* (1) followed.

SECOND APPEAL by the defendant, Indra Chandra Mukherjee, Chairman of the Jangipore Municipality.

This appeal arose out of an action brought by the plaintiff to recover a certain sum of money, which he alleged that the defendant illegally realised from him. The allegation of the plaintiff was that the defendant realised arbitrarily Rs. 34-3 from him by distress warrant on the 3rd February, 1909; that no notice of demand nor any bill was ever served or presented to him, and as such the action of the Municipality was wholly illegal. The plaintiff also claimed

\* Appeal from Appellate Order, No. 254 of 1911, and Rule No. 3396 of 1911, against the order of B. C. Mitter, District Judge of Murshidabad, dated Feb. 23, 1911, discharging the order of Aparā Prasad Mukherjee, Munsif of Jangipore, dated May 11, 1910.

1913

INDRA  
CHANDRA  
MUKHERJEE  
v.  
SRISH  
CHANDRA  
BANERJEE.

compensation for illegal and excessive distress, but the claim for compensation was afterwards deleted.

Defendant denied the liability on various grounds.

The suit was tried by the Munsif of Jangipore, who was also invested with the powers of a Small Cause Court Judge, in the ordinary manner. The Munsif gave the plaintiff a partial decree. On appeal by the plaintiff, the District Judge holding that the suit was triable by the Small Cause Court only, discharged the decree of the regular Court as being made without jurisdiction, and remitted the suit for trial on the Small Cause Court side.

Against this decision the defendant appealed to the High Court; and he also obtained a Rule.

*Babu Brajendra Nath Chatterjee*, for the appellant. The question is, when a money suit is tried in the ordinary way by a Munsif invested with the powers of a Small Cause Court Judge, whether the nature of the suit is altered. I submit it is not altered. The case of *Shankarbai v. Somabhai* (1) supports my contention. This, being a suit for recovery of money realised by illegal distress, is cognisable by the Small Cause Court, and no appeal lay to the District Judge, and he had no jurisdiction to set aside the order of the learned Munsif.

*Babu Bepin Behari Ghose*, for the respondent, contended that no second appeal lay, the suit being one cognisable by the Court of Small Causes, and its value being less than Rs. 500. The plaintiff was greatly prejudiced by the fact of the suit being tried in the ordinary way. Had it not been for that, he could have made an application under section 25 of the Provincial Small Cause Courts Act for setting aside the order. The plaintiff could not have sued for



the money as a debt. The suit is in substance one for compensation for illegal distress, and comes under section 35 cl. (j) of the Provincial Small Cause Courts Act. As the case was tried in the ordinary civil side, an appeal lay to the District Judge. The learned Judge ought not to have remitted the case to the Court of first instance, but he should have decreed the appeal.

1913  
INDRA  
CHANDRA  
MUKHERJEE  
v.  
SRISH  
CHANDRA  
BANERJEE.

CARNDUFF AND BEACHCROFT JJ. This appeal is from an appellate order, and it and the Rule connected therewith arise out of a suit brought by the plaintiff in the Court of the Munsif of Jangipore for the recovery from the local Municipality of a small sum of Rs. 34-3 said to have been illegally recovered from him. As will appear from what we are going to say, there is no second appeal in this case, and the appeal must, therefore, be dismissed as incompetent. We make no order as to costs.

We now proceed to deal with the Rule. The Munsif of Jangipore was vested with the powers of a Small Cause Court Judge. He, however, thought fit to try the case, not in the summary manner provided by the law, but at length as if it had been an ordinary suit, and he gave the plaintiff a modified decree. An appeal was then preferred to the District Judge by the plaintiff, and the District Judge held that the Munsif by following the ordinary procedure and not the summary procedure, had acted without jurisdiction. He accordingly set the decree aside and ordered the case to be retried by the same Munsif in a summary manner.

Such an order has, obviously, nothing to recommend it on the merits, and it could be justified only if the law rendered it unavoidable. In our view, however, it was the District Judge who acted without

1913

INDRA  
CHANDRA  
MUKHERJEE

v.

SRISH  
CHANDRA  
BANERJEE.

jurisdiction in making it, and there was no defect of jurisdiction in respect of the trial by the Munsif. Under section 15, sub-section (2) of the Provincial Small Cause Courts Act, 1887, all suits of a civil nature of which the value does not exceed Rs. 500, are cognizable by a Court of Small Causes, unless expressly excepted. By section 16 it is enacted that, save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable. And section 27 provides that a decree or order made under the foregoing provisions of the Act by a Court of Small Causes is final. The suit in question could, therefore, be tried by the Munsif only in the capacity of a Small Cause Court Judge; and we are of opinion, following the decision of Mr. Justice Candy and Mr. Justice Whitworth in *Shankarbhai v. Somabhai* (1) that, where a judicial officer invested with Small Cause Court jurisdiction tries a suit, which he might have tried under the summary procedure, in the ordinary manner, the character of the suit is not thereby altered and his decree is not appealable. Our conclusion, therefore, is that the District Judge's order was bad and made without jurisdiction.

There remains one more point to be noticed. It is suggested by the learned vakil who has appeared for the opposite party that the suit was really a suit for compensation for illegal distress, and was, therefore, excepted from the jurisdiction of the Small Cause Court by Art. 35, cl. (j), of the second Schedule to the Provincial Small Cause Courts Act, 1887. A reference to the plaint, however, will show that this is not so.

The plaintiff began, no doubt, by seeking to recover not only the actual amount illegally realised from him, but also damages assessed by him at Rs. 17. Before trial, however, he altered his plaint by striking out the claim for damages, which he said he desired to abandon. We cannot accept the ingenious contention that the suit remained, nevertheless, a suit for compensation, the measure of the injury to be compensated being the precise amount illegally recovered, and we agree with the learned District Judge in holding that it was a suit triable exclusively by the Small Cause Court.

The result is that the Rule is made absolute, the order of the District Judge set aside, and the decree of the Munsif restored. In this connection also we make no order as to costs.

S. C. G. *Appeal dismissed. Rule absolute.*

1913  
INDRA  
CHANDRA  
MUKHERJEE  
v.  
SRISH  
CHANDRA  
BANERJEE.

## APPELLATE CIVIL.

*Before Holmwood and Chapman JJ.*

SRISH CHANDRA PAL CHOWDHRY

v.

TRIGUNA PRASAD PAL CHOWDHRY.\*

1913  
Jun. 30.

*Review, application for—Suit—Res judicata—Compromise decree.*

An application for review is not a suit within the meaning of s. 13 of the Code of Civil Procedure, 1882, and a decision of a question arising in an application for review cannot operate as constructive *res judicata*.

\* Appeal from Appellate Decree, No 2114 of 1909, against the decree of H. E. Ransom, District Judge of Nadia, dated Aug. 20, 1909, affirming the decree of Pramatha Nath Chatterjee, Subordinate Judge of Nadia, dated Feb. 27, 1909.

1913

SRISH  
CHANDRA  
PAL  
CHOWDHRY  
v.  
TRIGUNA  
PRASAD  
PAL  
CHOWDHRY.

*Gulab Koer v. Badshah Bahadur* (1) referred to.

*Ram Gopal Majumdar v. Prasanna Kumar Samad* (2) distinguished.

SECOND APPEAL by Srish Chandra Pal Chowdhry, the plaintiff.

One, Sreenath Pal Chowdhry of Hatsila, brought a suit in the Court of the Subordinate Judge of Nadia against the plaintiff appellant and others for partition of certain ancestral *ijmali* properties between him and his co-sharers in proportion to their respective shares. The suit ended in a compromise, and a decree for partition was passed in accordance with it.

The suit, out of which this appeal arose, was a suit for declaration that certain properties in the partition suit were by mistake allotted to defendants Nos. 1 and 2 which were really intended to be kept as joint property and that, therefore, the deed of compromise should accordingly be rectified. Defendants Nos. 1 and 2 pleaded *res judicata* and denied that any mistake was made in the deed of compromise.

The learned Subordinate Judge dismissed the case. The plaintiff, thereupon, appealed to the District Judge of Nadia, who dismissed the appeal on the ground of *res judicata*. Against that decision the plaintiff preferred this second appeal to the High Court.

*Babu Baidyanath Dutt* and *Babu Manomohan Dutt*, for the appellant.

*Babu Braja Lal Chuckerbutty*, for the respondent.

*Cur. adv. vult.*

HOLMWOOD AND CHAPMAN JJ. The plaintiff appeals. He had been one of the defendants in a suit for partition. The suit had terminated in a compromise and the decree for partition had been in accordance with it. The present suit was for a declaration that in one

respect the compromise deed had not expressed the intention of the parties. The appellant's case was that it had been the intention to preserve a certain tank and the appurtenances thereto as joint property, but that by mistake these items had been allotted to certain persons who were made defendants in the present suit. The prayer was that the deed of compromise should be rectified accordingly.

1913  
 SRISH  
 CHANDRA  
 PAL  
 CHOWDHRY  
 r.  
 TRIGUNA  
 PRASAD  
 PAL  
 CHOWDHRY.

The appellant's suit was dismissed upon two grounds. The first ground is that the suit was barred by *res judicata*. The appellant had made an application for review of the judgment in the previous suit, upon the same ground as that put forward in the present suit. That application for review had been unsuccessful. The District Judge appears to have held that, the matter in issue between the parties having been heard and decided in the course of the proceedings in review, the present suit could not be entertained. It is contended that the learned District Judge here fell into error. The contention must in our opinion prevail. It is true that the parties to the present suit were also parties to the application for review. But an application for review is not a suit within the meaning of section 13 of the Code of Civil Procedure, and neither that section nor any doctrine of constructive *res judicata* can rightly be applied to cases of the present kind. The matter has been very fully discussed in the case of *Gulab Koer v. Badshah Bahadur* (1). We are in entire accordance with the views there expressed, and are of opinion that the previous case of *Ram Gopal Majumdar v. Prasanna Kumar Samad* (2) can rightly be distinguished upon the grounds there stated. The present suit was not, in our opinion, barred by reason of the decision in the previous application for review.

(1) (1909) 10 C. L. J. 420.

(2) (1905) 2 C. L. J. 508.

1913  
—  
SRISH  
CHANDRA  
PAL  
CHOWDHURY  
v.  
TRIGUNA  
PRASAD  
PAL  
CHOWDHURY.

The second ground upon which the appellant's suit was held to be incompetent was that, the compromise having merged in a decree, it was not open to the appellant to sue merely for the rectification of the compromise. He should have prayed for the rectification of the decree. This is, in our opinion, a mere technicality. The decree merely recited that the suit was decreed in terms of the compromise. The rectification of the decree must necessarily follow any rectification of the compromise, and if the plaintiff could make out a case for the rectification of the compromise he should in our opinion be given the relief to which the facts proved would entitle him, that is, a decree for the rectification of the decree based on the compromise. The technical omission in the plaint to ask for relief in this particular form should not be allowed to stand in the way.

The two preliminary grounds upon which the appellant's suit was dismissed were erroneous. We, therefore, set aside the judgment and decree of the learned District Judge and remand the case for disposal by him on the merits, in accordance with the above remarks. Costs will abide the result.

S. K. B.

*Appeal allowed ; case remanded.*

## APPELLATE CIVIL.

---

*Before Holmwood and Chapman JJ.*

HARISH CHANDRA ROY

v.

ATIR MAHMUD.\*

1913

Feb. 7

*Hindu Law—Inheritance—Ascetics—Sudras—Rules relating to ascetic persons of the Sudra caste.*

A *Sudra* cannot enter the order of *yati* or *sannyasi*, and therefore a *Sudra* who becomes an ascetic is not excluded from inheritance to his family estate unless some usage is proved to the contrary.

*Dharampuram v. Virajandiyam* (1) followed.

SECOND APPEAL by Harish Chandra Roy, the plaintiff.

This appeal arose out of a suit for recovery of *khas* possession of a third share of the lands in suit with mesne profits. The facts are these: the lands were the properties of one Sananda Ram Dass, who died leaving his widow, Droupodi Dassi, and his nephews (brothers' sons) Alak, Guru Dayal and Ram Krishna, as reversioners. The widow died in Jait 1308, B. S., when the properties devolved upon the said three reversioners in equal shares. One of them, Ram Krishna Dass, sold his share to the defendant No. 8, Brojo Nath Dass, in Bysak 1311, B. S., who again sold it over to the plaintiff along with other properties in Magh of the same year.

\* Appeal from Appellate Decree, No. 3621 of 1910, against the decree of Ashwini Kumar Bose, Subordinate Judge of Sylhet, dated July 27, 1910, reversing the decree of Shashi Kumar Ghose, Munsif of Habiganj, dated Feb. 17, 1910.

1913

HARISH  
CHANDRA  
ROY  
v.  
ATIR  
MAHMUD.

The plaintiff, being wrongfully kept out of possession thereof by the principal defendants, brought this action for *ichas* possession of the disputed one-third share with mesne profits.

The defendant No. 1 contended that Ram Krishna Dass, having become a *Baishnab* prior to the death of Droupadi Dassi, could not legally inherit the properties of Sananda Ram Dass, and hence the plaintiff had no title to the disputed lands. The learned Munsif decreed the suit. The defendant No. 1, thereupon, appealed from this decision of the Munsif of Habiganj to the Subordinate Judge of Sylhet, who discharged the decree of the lower Court and dismissed the plaintiff's suit with costs. Against this order of the Subordinate Judge the plaintiff appealed to the High Court.

*Babu Jyoti Prasad Sarbadhikari*, for the appellant.

*Maulvi Nuruddin Ahmed* and *Babu Rajendra Prasad*, for the respondents.

HOLMWOOD AND CHAPMAN JJ. This appeal arises out of a suit for possession of property which the plaintiff had purchased from one Brojo Nath Das who, in his turn, had purchased it from one Ram Krishna Dass. Admittedly the decision of the appeal turns upon the question whether Ram Krishna Das was entitled to this property at the time when he sold it. He was so entitled unless he was excluded from the inheritance to his family estate by the fact of his having become a *Baishnab*.

The learned Subordinate Judge held that Ram Krishna Das had totally renounced all connection with worldly affairs; that, therefore, he was excluded from the inheritance and had no title to the property which he sold. On this ground he dismissed the



plaintiff's suit. The learned Subordinate Judge, however, has overlooked the fact that Ram Krishna Das was a *Sudra* and, therefore, could not, if he wished, enter the orders of *yati* or *sannyasi*, the members of which alone are excluded from inheritance to their family estates under the Hindu law. In the case of *Dharmapuram v. Virapandiyam* (1), Subramania Ayer J. pointed out that all authorities necessarily and clearly imply that a *Sudra* cannot enter the order of *yati* or *sannyasi*, and that therefore a *Sudra* who becomes an ascetic is not excluded from inheritance to his family estate unless some usage is proved to the contrary. No sufficient authority has been shown to lead us to the conclusion that the Hindu law on the subject is otherwise. No doubt the lower castes have been allowed to enter the monastic orders founded by Ramanand and others in more recent times, and it may be that *Baishnabs* of those orders have adopted customs of inheritance under which, although they may have been *Sudras* by caste, they lose the right to succeed to their own family estates, and the inheritance to property left by them devolves according to the rules of the particular order; but no custom of that kind has been proved in the present case.

We are of opinion that the Hindu texts applicable to the disinheritance of ascetics do not apply to *Sudras* and, therefore, have no application in this case.

That being so, the plaintiff had a good title. The appeal is allowed. The decree of the Subordinate Judge is set aside and the decree of the Munsif is restored with costs in all Courts.

S. K. B.

*Appeal allowed.*

1913  
 HARISH  
 CHANDRA  
 ROY  
 v.  
 ATIR  
 MAHMUD.

**CRIMINAL REVISION.***Before Sharfuddin and Richardson JJ.*

1913

Feb. 10.

JHULAN SAIN

v.

EMPEROR.\*

*Grave-yard—Trespass—Erection of a shed over a visible grave in a disused private grave-yard—Penal Code (Act XLV of 1860), s. 297.*

The erection of a shed over a visible grave belonging to the complainant's family in a disused grave-yard, claimed to be private property of the trespasser, with the knowledge that the feelings of the complainant would be likely to be thereby wounded, is an offence under s. 297 of the Penal Code.

*Per* RICHARDSON, J. The word "trespass" in s. 297 has not the same meaning as "criminal trespass" in s. 441 of the Code, but implies any violent or injurious act committed in the place, and with the knowledge or intent defined in s. 297.

THE facts were as follows. In the suburbs of Backergunge there is a grave-yard which has not been used for burials for about 14 years. The petitioner claimed the land as his own ancestral property, alleging that he was in possession of it and had always enjoyed the fruit of the trees growing thereon. On the 15th July, 1912, he commenced to erect in a corner of the grave-yard a hut, the plinth of which covered the grave of the mother of the complainant. The latter lodged a complaint against the petitioner, under ss. 295 and 297 of the Penal Code, before the Deputy Magistrate of Patna, who, after trial, acquitted him under s. 295, but convicted him, and sentenced him under s. 297, on the 14th September, 1912, to a fine

\* Criminal Revision No. 1637 of 1912 against the order of F. R. Roe, Sessions Judge of Patna, dated Oct. 4, 1912.

of Rs. 51, and in default to one month's simple imprisonment. The petitioner appealed against the order to the Sessions Judge of Patna, who upheld the same by his judgment dated the 4th October, 1912. The petitioner, thereupon, moved the High Court and obtained the present Rule.

1913  
 JHULAN  
 SAIN  
 v.  
 ENTERBOR

*Babu Surendra Nath Ghosal*, for the petitioner. The grave-yard is a private one and has not been used for the last 14 years. Section 297 does not apply to such a case. The land belongs to the accused, who has always been in undisturbed possession and has enjoyed the fruits of the trees growing on it. His act does not constitute trespass as defined in s. 441 of the Penal Code: see *In re Khaja Mahomed Hamin* (1) and *Mustaffa Rahim v. Motilal Chunilal* (2).

SHARFUDDIN J. This was a Rule calling upon the District Magistrate of Patna to show cause why the conviction of the petitioner and the sentence passed upon him should not be set aside on the facts found by the lower Court.

It appears that the petitioner was prosecuted for two offences, namely, one under section 295 and the other under section 297 of the Indian Penal Code. The offence under section 295 related to the petitioner's building a *chabutra*, and thus causing disturbance of the complainant's mother's grave, except as to the small portion known as the minaret. With regard to this offence there has been no conviction, and the petitioner has, therefore, been acquitted. But he has been convicted for the offence under section 297 of the Indian Penal Code. That section runs thus:—"Whoever, with the intention of wounding the feelings of any person, or of insulting the religion

(1) (1881) I. L. R. 3 Mad. 178.

(2) (1909) 2 Ind. Cas. 825.

1913  
JHULAN  
SAIN  
v.  
EMPEROR.  
SHARFUDDIN  
J.

of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sepulture, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both." It has been found that this particular piece of land used to be a burial ground about fourteen years ago, and that since then, under the orders of the Municipality, it has not been used for burying purposes. But there are graves still visible on it, and the petitioner has been charged with having commenced to raise a shed over the grave of the complainant's relations, with the knowledge that the feelings of the complainant would be likely to be wounded thereby; and he has been convicted under section 297 of the Indian Penal Code, and sentenced to pay a fine of Rs. 51.

The contentions on behalf of the petitioner are that the land in question is his ancestral land, that it belongs to him and is in his possession, that he is in enjoyment of the fruits of the trees standing upon it, and that the land is no more a burying ground or depository for the remains of the dead, inasmuch as it has not been used for burying purposes for a great many years. In my opinion, however, it is not necessary, for the purposes of section 297 of the Indian Penal Code, that a burial ground should be in use. If it has been a burial ground and if there are visible graves in it, it becomes a depository for the remains of the dead. It is possible that the bodies in those graves may have

disappeared, but the remains of those bodies are still there, although they may have crumbled to dust; and any act of trespass by which the feelings of the relations of the dead are wounded would certainly come under section 297 of the Indian Penal Code. In these circumstances, I am of opinion that the petitioner has been rightly convicted and sentenced, and I would, therefore, discharge the present Rule.

1913  
 JHULAN  
 SAIN  
 v.  
 EMPEROR.  
 SHARFUDDIN  
 J.

RICHARDSON J. I agree. It is argued that the word "trespass" in section 297 of the Indian Penal Code has the same meaning as that attached to the expression "criminal trespass" by section 441 of the Indian Penal Code. To that argument I find it difficult to assent. I cannot see how section 441 can be read into section 297 with any intelligible result. The term "trespass" in section 297 appears to mean any violent or injurious act committed in such place and with such knowledge or intention as is defined in that section. It seems to me here that in placing the shed over the grave of the complainant's mother the petitioner has committed a "trespass" which he must have known would be likely to wound the feelings of the complainant, and the other surviving relations of the deceased.

It is said that, at any rate, the petitioner had the possession and custody of the land in which the tomb stood, and that the mere entry upon the land would not, therefore, amount to a trespass. That, no doubt, is so, but what is found here is that the petitioner did more than merely enter upon this land. It is not contended that he had the right to use the land for all purposes as land in its natural state. It is not suggested, for instance, that he could remove the tombs and plough up the whole surface of the land. It is not denied that the place was at one time

1913  
 JHULAN  
 SAIN  
 " .  
 EMPEROR.  
 ———  
 RICHARDSON  
 J.

lawfully used as a place of sepulture. So far at any rate as it was so used, it was set apart as a depository for the remains of the dead and is entitled, therefore, to the protection afforded by section 297. With these observations I agree that the Rule should be discharged.

E. H. M.

*Rule discharged.*

---

### PRIVY COUNCIL.

---

P.C.<sup>o</sup>  
 1913  
 ———  
 Feb. 11.

BAIJNATH RAM GOENKA

*v.*

NAND KUMAR SINGH.

#### [ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

*Commissioner, power of—Revenue Commissioner, power to review order made by him annulling sale for arrears of revenue—Act XI of 1859, s. 25, as amended by Bengal Act VII of 1868, s. 2.*

*Held* (affirming the decisions of the Courts in India), that a Revenue Commissioner acting under Act XI of 1859, as amended by Bengal Act VII of 1868, had, under the circumstances, no power to review his order setting aside a sale held for arrears of revenue.

APPEAL from a decree (14th May 1907) of the High Court at Calcutta, which affirmed a decree (28th November 1905) of the Court of the Subordinate Judge of Monghyr.

The defendant was the appellant to His Majesty in Council.

This was an appeal from the decision of the High Court (RAMPINI and SHARFUDDIN JJ.) reported in

<sup>o</sup> *Present*: LORD ATKINSON, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

I. L. R. 34 Calc. 677 where the facts will be found sufficiently stated.

On this appeal,

*De Gruyther K. C. and G. A. H. Branson*, for the appellant, contended that the Commissioner had full power to review his order of 23rd March 1900 when he found it was wrong. Acts XI of 1859 and Bengal Act VII of 1868 contain no procedure relating to reviews, so that there was nothing in them to prevent him from exercising his discretion and revising it. Nor is the procedure in the Civil Procedure Code made applicable. Act XI of 1859, sections 25, 33 and 36, and Bengal Act VII of 1868, section 2, were referred to, and it was submitted that every Court had an inherent power to alter on review an erroneous order made by itself. "Final" meant that an order was not subject to appeal by any other Revenue Officer. [LORD ATKINSON: The former order, though a bad decision in law, is a good and effective order. The fact that it is wrong gave the Commissioner no power to alter it.] The case of *Lala Pryag Lal v. Jai Narayan Singh* (1), on which the High Court relied, was distinguishable inasmuch as it was a case where a Revenue Commissioner reviewed an order made by his predecessor. Reference was made to cases decided under the Dekhan Agriculturists' Relief Act (XVII of 1879) sections 73, 74, where reviews were allowed on the ground of mistake, and of an order wrongly made *ex parte*: see *Badaricharya v. Ram Chandra Gopal Savant* (2), and *Ram Chandra Narayan Kulkarni v. Draupadi* (3). The Commissioner's order (21st June, 1900) made on review was valid.

1913  
BALJNATH  
RAM GOENKA  
v.  
NAND KUMAR  
SINGH.

(1) (1895) I. L. R. 22 Calc. 419. (2) (1893) I. L. R. 19 Bom. 113, 115.

(3) (1895) I. L. R. 20 Bom. 281, 283.

1913

BALJNATH  
RAM GOENKAv.  
NAND KUMAR  
SINGH.

*B. Dube*, for the respondent, was not called upon.

The judgment of their Lordships was delivered by LORD ATKINSON. Their Lordships are clearly of opinion that the order of the 23rd of March, 1900, was final and conclusive, and that, so far as the Commissioner was concerned, he had no power to review that order in the way in which he has reviewed it. That is the only point in the case. They will humbly advise His Majesty that the appeal ought to be dismissed.

The appellant must pay the costs.

*Appeal dismissed.*

Solicitors for appellant: *Watkins & Hunter*.

Solicitors for the respondent: *Barrow, Rogers & Nevill*.

J. V. W.



## PRIVY COUNCIL.

KIDAR NATH

v.

MATHU MAL.

P.C.\*

1913

Feb. 14.

## [ON APPEAL FROM THE CHIEF COURT OF THE PANJAB, AT LAHORE.]

*Hindu Widow—Alienation—Setting aside alienation—Compensation to defendant for improvements—Evidence of relationship—Statement in will of widow—Conjectural suggestions as to will in argument in lieu of evidence—Suggestions never made in cross-examination of writer of will.*

The respondent on the death of a Hindu widow brought a suit as the next heir of her husband to set aside an alienation, made by the widow in favour of the appellant, of property consisting of a house and compound at Delhi. The respondent, who was the son of a daughter of the husband by a former wife (though this was denied by the appellant), produced a will, made by the widow five years before the suit, in which she stated "I have no issue or any near relative. Mathu Mal (the respondent) is related to me as a daughter's son (*rishte men nawasa*) and Khairati Lal as my husband's younger brother. These are my relatives on my husband's side." The oral evidence as to the respondent's title was found by their Lordships to be meagre and conflicting.

*Held* (affirming the decision of the Chief Court), that the statement in the will was, under the circumstances, conclusive of the respondent's relationship. The widow was the proper person to make such a statement of fact, which was within the scope of her own knowledge; she put forward the respondent in the will as the first person in the order of choice for the performance of the funeral ceremonies; her statement was corroborated by the other relative mentioned in the will, who was a witness in the case, and whose evidence on the matter was against his own interest; and the statement was uncontradicted by any reliable evidence.

Mere conjectural suggestions made in argument, that the will had been executed for the purpose of supporting a future claim to be made by the respondent, could not be entertained by their Lordships in lieu of evidence, especially when the writer of the will was himself a witness in the case, and

\* *Present* : LORD SHAW, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALL.

1913

KIDAR NATH  
v.  
MATHU  
MAL.

no such conjectural considerations were suggested to him in cross-examination.

In case of the respondent succeeding, the appellant claimed the value of improvements made by him to the property while he was in possession of it, which included a temple (Rs. 2,700), a well (Rs. 300), an upper storey to the house (Rs. 2,500), and repairs to the house (Rs. 1,500), the whole amounting to Rs. 7,000.

*Held* (affirming the decision of the Chief Court and for the reasons given by it), that Rs. 1,400, which represented half the expenditure by the appellant on the well and the upper storey to the house, should be allowed as compensation for the improvements. The real question was, had they enhanced the market value of the property? It was doubtful whether the erection of the temple had done so, and it had not been contended that it had.

APPEAL from a judgment and decree (7th July 1906) of the Chief Court of the Panjab, which reversed a judgment and decree (7th September 1905) of the District Judge of Delhi.

The defendant was the appellant to His Majesty in Council.

The suit which gave rise to this appeal was brought by the respondent for possession of a house and compound situated in Delhi. The main question in dispute was whether the plaintiff had proved his title to the property in suit.

The plaint, filed on 8th March 1905, stated that the plaintiff's maternal grandfather, Bishan Lal, was twice married. By his first wife he had a daughter, Musammat Parbati, the mother of the plaintiff: by his second wife, Musammat Munia, he had no issue. The first wife died in the lifetime of Bishan Lal who died about 1855. On his death Musammat Munia succeeded to his estate for the usual life tenure of a Hindu widow. By a deed of sale, dated 3rd March 1866, she conveyed her interest in the property in suit to one, Rammi Mal, the father of the defendant, for Rs. 4,650, and put the vendee in possession, on whose death the defendant, his son, took possession. Musammat Munia

died on 29th September 1904, and on her death the defendant failing to deliver up the property, the present suit was instituted.

The defendant admitted that Musammat Munia was Bishan Lal's widow, but denied that the plaintiff was the grandson of Bishan Lal by another wife, and that Musammat Parbati was Bishan Lal's daughter. He also contended that among Kyasths (the caste to which the plaintiff belonged) a daughter's son did not succeed, and that a widow had full powers over the property she inherited. He also contended that the suit was barred by limitation, inasmuch as Musammat Munia had abandoned worldly affairs by becoming a *fakir* some 40 years before suit, and had thus forfeited or lost her interest in the property as effectually as if she had then died; that the sale had been effected for necessity and was therefore valid and binding; and finally alleged that he had spent considerable sums on the improvement of the property, which, if the plaintiff was held entitled to succeed, should be refunded to the defendant.

As to the plaintiff's right to the property, Musammat Munia had left a will, dated 22nd November, 1899, in which she stated, "I have no issue or any near relative. Hardeo Sahai *alias* Mathu Mal is related to me as daughter's son, and Lala Khairati Lal, son of Lala Sham Lal, as my husband's younger brother. These are my relatives on my husband's side." The questions for decision were stated in the judgment of the Chief Court as follows:—(i) whether Musammat Parbati was the daughter of Bishan Lal; (ii) whether Bishan Lal had a son by Musammat Munia who survived him; (iii) whether the suit was barred by limitation; (iv) whether the sale was for necessity; and (v) to what, if any, compensation is defendant entitled if it be held that plaintiff has proved his heirship to Bishan Lal.

1913

KIDAR NATH

v.

MATHU  
MAL.



1913  
 KIDAR NATH  
 v.  
 MATHU  
 MAL.

On these questions the District Judge had found question (ii) in the negative ; on (iii) that though Musammat Munia had become a *fakir*, she had not in any way abandoned worldly affairs, or lost her civil rights ; on (iv) that no necessity for the sale had been established ; and on (v) that the defendant had certainly spent money on the improvement of the property, and that if the plaintiff had been otherwise entitled to a decree, the grant of such decree should have been made conditional on the payment to the defendant of a sum of Rs. 7,000 as compensation. The District Judge, however, dismissed the suit, on the ground that the plaintiff, though proved to be the son of Musammat Parbati, had not established his allegation that Musammat Parbati was the daughter of Bishan Lal.

The plaintiff's appeal to the Chief Court was heard by Mr. H. A. B. RATTIGAN and Mr. C. W. CHITTY, Judges of the Court, who, on question (i), after saying that considering the time that had elapsed since the deaths of Bishan Lal and Parbati Lal "it was not surprising that the oral evidence produced by the plaintiff was not of a very convincing character, and that the witnesses' statements were mostly hearsay," continued :—

"But Musammat Munia herself must undoubtedly have known the true facts of the case, and the witness Khairati, who is over 70 years of age, and a first cousin of the deceased Bishan Lal, may also be reasonably credited with an intimate knowledge of the affairs of the family. This being so, it is, we think, a very strong point in plaintiff's favour that Musammat Munia, in the will executed by her, on 22nd November, 1899, speaks of the plaintiff as a relative on her husband's side, and as related to her as a sort of daughter's son (*rishte men nawasa*). The District Judge regards the expression as curious, and thinks that it indicates some qualification of the relationship of grandson. It certainly does, but the qualification is perfectly reasonable and correct. Musammat Munia was obviously aware of the fact that plaintiff was not her own daughter's son, and, equally naturally, she did not describe him as such. But if he was (as he alleges)

the son of her husband's daughter by a former wife, she would not unnaturally refer to him as 'a kind of daughter's son' when she speaks of her husband's relatives. At all events, we have her clear admission that plaintiff was, 'in a sense', her daughter's son, and she knew that she had herself no daughter. The only inference, therefore, that can in reason be drawn, is that plaintiff is the son of a daughter of Bishan Lal by another wife, and that Musammat Munia recognised him as such. In our opinion, this admission on her part is a very weighty piece of evidence in favour of plaintiff, and in addition to it we have the express evidence of Khairati Lal, the only other near relative of Bishan Lal. This man was Bishan Lal's first cousin, and if plaintiff did not stand in his way he would be the heir to the property left by the deceased. But, despite this fact, we find him admitting that plaintiff's mother was the daughter of Bishan Lal, and this admission, which was against his own interest, must clearly carry great weight. We have thus the only two members of the family whose statements are on record in the case supporting plaintiff's claim as the son of Bishan Lal's daughter, and we have, on the other hand, no evidence worthy of the name to the contrary. Under these circumstances, we are justified in holding that plaintiff has fully established his contention that he is the daughter's son of Bishan Lal."

On the question (ii) as to whether Bishan Lal had a son who survived him by Musammat Munia, the Chief Court, after discussing the evidence, said:—

"In our opinion, and the District Judge came to the same conclusion, it has not been satisfactorily proved that Bishan Lal had a son by Musammat Munia; but even if he had, we can find no proof that that son survived Bishan Lal."

On questions (iii) as to limitation, and (iv) as to the existence of necessity for the sale, the Chief Court agreed with the decisions of the District Judge.

On question (v) the Chief Court concluded their judgment thus:—

"The last question is whether the defendant is entitled to any, and if so to what, compensation for improvements alleged to have been made by him. The District Judge finds that Musammat Parbati, plaintiff's mother, in no way acquiesced in defendant's treatment of the property, and that plaintiff himself only acquired an active interest in the property when his mother died in 1889. But he holds that if plaintiff is to get a decree, it must be on the condition of paying a sum of Rs. 7,000 by way of compensation to defendant, because, even if plaintiff did not consent to the buildings and

1913

KIDAR NATH  
v.  
MATHU  
MAL.

1913  
 KIDAR NATH  
 v.  
 MATHU  
 MAI

repairs made by defendant, he did not object to the same. The learned Judge admits that defendant has for many years had the benefit of his expenditure on the house, but we hold that it is only equitable that plaintiff if he is to succeed, should pay something of this expenditure.

"The alleged improvements effected by defendant are as follows:—

(i) The building of a temple in the compound The value of this temple is estimated at Rs. 2,700; (ii) the building of a well, said to have cost Rs. 300; (iii) the building of an upper storey to the house, valued at Rs. 2,500; and (iv) repairs to the house, valued at Rs. 1,500.

"There is no evidence whatever to show that plaintiff knew of, or acquiesced in, the making of any of these so-called improvements, and as defendant had purchased from a widow, whose estate he must be taken to have known was of a limited nature, it is not unreasonable to hold that any improvements effected by him were done at his own risk. Nor is it easy to understand why plaintiff should be compelled to pay for the erection of a temple in the compound of the house, an erection which he himself may regard as detracting from, rather than adding to, the value of the house. The repairs, again, were effected some 15 years before suit, and we cannot agree that plaintiff should be made to pay the full amount said to have been expended by defendant in effecting these repairs. For all these years defendant has had the benefit of the property and of the repairs made by him, and a very considerable deduction would have to be made for depreciation by reason of ordinary wear and tear. Upon the whole, we think that if plaintiff is made to pay a reasonable sum as compensation to the defendant for his expenditure upon the upper storey and the well (*i.e.*, a sum of, say, Rs. 1,400, which represents half the expenditure thereon by defendant), no further demand can reasonably be made upon him. As regards the temple, we think that upon the principle laid down in *Premji Jivan Bhate v. Cassum Juma Ahmed* (1), defendant is at most entitled to remove the materials but cannot ask for compensation in money."

On this appeal,

*Ross K. C.* and *Arthur Grey*, for the appellant, contended that the respondent had failed to prove his title to the property. There was no proof that Parbati was the daughter of Bishan Lal, or that the respondent was the son of Parbati. But even if that were proved, it was submitted that the caste to which the respondent belonged was governed, not by Hindu law, but by

custom; and the custom set up here was that a daughter's son was not in the line of succession. If that were not so, and Hindu law governed the case, the evidence showed that Bishan Lal had a son who survived him by Munia, so that even by Hindu law the respondent was not the next heir of Bishan Lal, and therefore was not entitled to maintain the present suit. The statement in the will of Munia was not sufficient to prove that the respondent was the daughter's son of Bishan, as held by the Chief Court. It was suggested also that the will might have been made for the purpose of supporting any future claim of the respondent to the property. Reference was made to the Evidence Act (I of 1872) section 76; and the Registration of Births, Marriages, and Deaths Act (VI of 1886) section 21, as to the value as evidence of certificates of death.

1913  
 KIDAR NATH  
 v.  
 MATHU  
 MAL.

But if the respondent were held entitled to the property, it was contended that compensation for improvements should be allowed to the appellant. The Chief Court had erred in setting aside the findings of the District Judge as to the nature and value of the improvements made by the appellant on the property in dispute, and in allowing only a sum of Rs. 1,400 as compensation. That sum, was, it was submitted, inadequate on the evidence and under the circumstances of the case.

*De Gruyther K.C.* and *G. C. O'Gorman*, for the respondent, were not called upon.

The judgment of their Lordships was delivered by

LORD SHAW. This is an appeal from a judgment and decree of the Chief Court of the Panjab. The decree was dated the 7th of July, 1906. It reversed a decree of the District Judge of Delhi. The respondent, as plaintiff, sued the appellant for possession

Feb. 14.



1913  
KIDAR NATH  
v  
MATHU  
MAL.

of a house and compound in Delhi. The first Court dismissed the suit, and on appeal the Chief Court gave the plaintiff a decree for possession of the property on certain terms.

Nine issues were raised, and evidence was adduced with regard to them in the Court of first instance; the questions have now, however, been limited to the issues upon which the Chief Court proceeded, and which are now to be referred to.

The first of those questions is, has the relationship of the plaintiff, which is in issue in this suit, been proved? The proof is denied. One Bishan Lal, the former owner of the property, was twice married; by his first wife the allegation is that he had a daughter who was the mother of the plaintiff, Mathu Mal. The oral evidence upon the point is meagre and conflicting.

Under these circumstances the Chief Court looked for assistance to any deeds or documents under the hand of the second wife, Munia, of the plaintiff's grandfather. That second wife executed a will, and the particular provisions of that will are to be found on pages 15 and 16 of the record. The will was executed on the 22nd of November, 1899. In that will this lady, who, of all people, was the person to make a statement of fact with regard to her husband's history, his relationships, and his succession, at two different parts of the document declares that she has no issue nor any near relative. She says: "Hardeo Sahai, *alias* Mathu Mal, is related to me as my daughter's son." Then after mentioning a further relative, she says: "These are my relatives on my husband's side." She repeats the statement, to a similar effect, in the same document, and she puts forward Mathu Mal, so related to her husband, as the person who is first in order of choice for performing the funeral religious ceremonies of *kirya karam*, that

circumstance being one, in regard to these Indian relationships, of great value.

1913

KIDAR NATH

v  
MATHU  
MAL.

In this situation their Lordships are of opinion that, in the most solemn form, this lady had declared facts which must have been within the scope of her own knowledge; and, if her version of the facts be sound, there can, in their Lordships' view, be no doubt that the judgment appealed from is correct. Their Lordships put to the learned counsel, who argued the case with conspicuous moderation, the point whether, if this lady, being alive, had testified in a Court of law in the same sense as this will declared, there could have been any answer; and it was admitted that such testimony, unshaken in cross-examination, would have been conclusive on this matter of fact.

Their Lordships are accordingly of opinion that the Chief Court was justified in attaching great weight to the contents of this will, and that the conclusion, upon this matter of fact, reached by them, is a conclusion which now cannot be successfully assailed.

Their Lordships desire to add that they do not think it is open to this Board to entertain, in lieu of evidence, a suggestion to the effect that this will—made five years before her death—was part of a scheme which was to emerge in favour of one party to the present suit, after that suit was brought. These were conjectural efforts made in argument, but they do not amount to anything which would weigh with the judgment of the Board on the point of evidence. Their Lordships conclude their judgment upon this portion of the case by remarking that the person who drew this document was himself a witness. He was open to cross-examination, and no suggestion in favour of these conjectural considerations was made while the witness was in the box.

1913  
KIDAR NATH  
v  
MATHU  
MAL.

of a house and compound in Delhi. The first Court dismissed the suit, and on appeal the Chief Court gave the plaintiff a decree for possession of the property on certain terms.

Nine issues were raised, and evidence was adduced with regard to them in the Court of first instance; the questions have now, however, been limited to the issues upon which the Chief Court proceeded, and which are now to be referred to.

The first of those questions is, has the relationship of the plaintiff, which is in issue in this suit, been proved? The proof is denied. One Bishan Lal, the former owner of the property, was twice married; by his first wife the allegation is that he had a daughter who was the mother of the plaintiff, Mathu Mal. The oral evidence upon the point is meagre and conflicting.

Under these circumstances the Chief Court looked for assistance to any deeds or documents under the hand of the second wife, Munia, of the plaintiff's grandfather. That second wife executed a will, and the particular provisions of that will are to be found on pages 15 and 16 of the record. The will was executed on the 22nd of November, 1899. In that will this lady, who, of all people, was the person to make a statement of fact with regard to her husband's history, his relationships, and his succession, at two different parts of the document declares that she has no issue nor any near relative. She says: "Hardeo Sahai, *alias* Mathu Mal, is related to me as my daughter's son." Then after mentioning a further relative, she says: "These are my relatives on my husband's side." She repeats the statement, to a similar effect, in the same document, and she puts forward Mathu Mal, so related to her husband, as the person who is first in order of choice for performing the funeral religious ceremonies of *kirya karum*, that

circumstance being one, in regard to these Indian relationships, of great value.

1913

KIDAR NATH

v  
MATHU  
MAL.

In this situation their Lordships are of opinion that, in the most solemn form, this lady had declared facts which must have been within the scope of her own knowledge; and, if her version of the facts be sound, there can, in their Lordships' view, be no doubt that the judgment appealed from is correct. Their Lordships put to the learned counsel, who argued the case with conspicuous moderation, the point whether, if this lady, being alive, had testified in a Court of law in the same sense as this will declared, there could have been any answer; and it was admitted that such testimony, unshaken in cross-examination, would have been conclusive on this matter of fact.

Their Lordships are accordingly of opinion that the Chief Court was justified in attaching great weight to the contents of this will, and that the conclusion, upon this matter of fact, reached by them, is a conclusion which now cannot be successfully assailed.

Their Lordships desire to add that they do not think it is open to this Board to entertain, in lieu of evidence, a suggestion to the effect that this will—made five years before her death—was part of a scheme which was to emerge in favour of one party to the present suit, after that suit was brought. These were conjectural efforts made in argument, but they do not amount to anything which would weigh with the judgment of the Board on the point of evidence. Their Lordships conclude their judgment upon this portion of the case by remarking that the person who drew this document was himself a witness. He was open to cross-examination, and no suggestion in favour of these conjectural considerations was made while the witness was in the box.

1913

KIDAR NATH

v.  
MATHU  
MAL.

There now only remains one question to be determined, and that is as to the amount of the allowances which are to be made as a condition of taking possession of this house and compound. It appears that in the course of the possession of the last holder a temple was erected upon the ground, and other expenditure was incurred to a considerable amount. The Chief Court assessed the sum of Rs. 1,400 as a fair sum to the extent of which the property, as a vendible subject, has been enhanced in value by the operations of the last holder. Their Lordships are of opinion that the grounds upon which the Chief Court proceeded are sound. In such a case it is always to be borne in mind that the amount of the expenditure made has occasionally very little to do with the real issue; and that that issue is, to what extent has enhancement of the subject been produced? Their Lordships agree with the Chief Court in thinking that it has been produced to the extent of Rs. 1,400. But with regard to the difference between that sum and the Rs. 7,000 claimed, a large part of that difference stands to the account of the erection of the temple upon the land. It has not been contended in argument before the Board that the erection of the temple would of itself add to the selling value of the property, and the real question is, was the property, as a marketable subject, enhanced in value or not? Their Lordships are of opinion that it was enhanced, but only to the extent stated in the judgment appealed from.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed, and that the decree of the Court below should be affirmed. The appellant must pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellant: *Soutter & Fox.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.

**APPELLATE CIVIL.***Before Jenkins C.J. and Mullick J.***BABURAM BAG***v.***MADHAB CHANDRA POLLAY.\***

1913

Feb. 17.

*Specific Performance—Agreement to renew a lease when specifically enforceable against a subsequent lessee for value—Duty of subsequent lessee to enquire of terms of previous lease—Specific Relief Act (I of 1877), s. 27.*

An agreement to renew a lease under certain conditions on the determination of the term of the lease can be specifically enforced against a subsequent lessee for value who has omitted to make an inquiry of the tenant in possession about the terms of the lease under which he was holding it.

The occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights, and if he chooses to make no inquiry of the tenant, he cannot claim to be a transferee without notice.

**SECOND APPEAL** by Baburam Bag and another, plaintiffs.

On the 1st May, 1901, certain zemindars of a fishery leased that fishery to one Madhab Chandra Pollay, the defendant No. 1 in the suit now in appeal, saying, "on the expiry of the term of your lease and on your prayer and agreement to pay the rent proposed by the other tenants, we will grant you for the second time a temporary *patta*." This lease would have expired, if not renewed, on the 30th April, 1908. Meanwhile, on the 11th July, 1906, the same zemindars gave a lease of this same fishery for seven years, from

\* Appeal from Appellate Decree, No. 1667 of 1910, against the decree of F. R. Roe, District Judge of 24-Pergannahs, dated March 11, 1910.

1913

BABURAM  
BAG  
v.  
MADHAB  
CHANDRA  
POLLAY.

the 1st May, 1908, to Baburam Bag and another, the plaintiffs in the suit in appeal. In it they said, "if we cannot eject the former tenant easily, and if there be any litigation on that account, the money that will be expended will be paid by us. If we cannot give you possession, we will refund to you the *selami* and the deposit which you have paid." Now, the plaintiffs in this case sued for possession of the *julkar*, on the ground that Madhab Chandra was a trespasser. The Court of first instance decreed the suit, but made provision in the decree for defendant No. 1 to remain in possession for a year after the expiry of his original lease, inasmuch as he had been prejudiced by the lease to the plaintiffs. The lower Appellate Court reversed the decree of the Subordinate Judge, dismissing the suit with costs against the tenant-defendant, viz., defendant No. 1, and decreeing the appeal against the landlord-defendants, with costs for a refund of the *selami* and deposit made by the plaintiffs.

The plaintiffs, thereupon, preferred this second appeal.

*Babu Ramchandra Majumdar* (with him *Babu Atul Chandra Dutt*), for the appellants. The agreement of 1901 cannot be specifically enforced against the plaintiffs. The plaintiffs are transferees for value. They did not know anything of the provision for renewal of lease with defendant No. 1.

[JENKINS C. J. Does not the principle of *Walsh v. Lonsdale* (1) apply to the case?]

That case is distinguishable. I rely on *Manchester Brewery Co. v. Coombs* (2), and section 27, Specific Relief Act.

There is no finding of knowledge of the plaintiff of the covenant in favour of the defendant. At the

(1) (1882) 21 Ch. D. 9.

(2) [1901] 2 Ch. 608, 617.

time of the lease with the plaintiff, possession of the defendant was under the old lease.

[JENKINS C. J. Notice will be implied of all his rights. The plaintiff ought to have enquired of the man in possession.]

[*Dr. Ghose.* See *Allen v. Anthony* (1), and the observations of Jessel M. R. in *Putman v. Harland* (2). Section 27 of the Specific Relief Act throws the onus on you.]

I want an opportunity to show that I had no knowledge. The plaintiff was taken by surprise.

*Dr. Rashbehary Ghose* (with him *Babu Probodh Chandra Rai* and *Babu Haricharan Ganguli*), for the respondent. Onus is on the lessee or purchaser to show he had no notice. Even if the onus were on my client, he has discharged it.

There cannot be a remand, because the Appellate Court was not invited to take further evidence. The question is one of law: *Eshan Chunder Sein v. Shaikh Dhonaye* (3).

The purchaser is bound by all the equities and interests under collateral agreement: Dart on Vendors and Purchasers, p. 884. *Taylor v. Stibbert* (4), *Daniels v. Davison* (5), *Barnhart v. Greenshields* (6), *Mancharji Sorabji Chulla v. Kongseoo* (7), *Allen v. Anthony* (1).

Finally, there is the plaintiff's own admission that he did not make any inquiry of defendant No. 1 of the terms of his lease. He should have.

JENKINS C. J. This Special Appeal arises out of a suit brought to recover possession of certain *julkar*

1913

BABURAM  
BAG  
v.  
MADHAB  
CHANDRA  
POLLAY.

- (1) (1816) 1 Mer. 282; 15 R. R. 113. (5) (1811) 16 Ves. 249; 17 Ves. 433; 10 R. R. 171.  
(2) (1881) 17 Ch. D. 353. (6) (1853) 9 Moo. P. C. 18;  
(3) (1869) 11 W. R. 61. 14 E. R. 204.  
(4) (1794) 2 Ves. Jn. 437; 2 R. R. 278. (7) (1869) 6 Bom. H. C. 59.



1913  
 ———  
 BABURAM  
 BAG  
 v.  
 MADHAB  
 CHANDRA  
 POLLAY.  
 ———  
 JENKINS C.J.

rights. This *julkar* had been leased on the 2nd of March, 1901, to the first defendant for a period of seven years. On the 1st of May, 1901. the lessors entered into an agreement with the lessees for renewal, under certain conditions, on the determination of this term. On the 11th of July, 1906, the lessors purported to settle the *julkar* with the plaintiffs for a term of seven years from the 1st of May, 1908, and we are told that the plaintiffs in return of this paid a sum of Rs. 600. The plaintiffs now seek to recover possession of these *julkar* rights on the ground that the lease of the 2nd of March, 1901, in favour of defendant No. 1 has come to an end. In the Court of the Subordinate Judge a decree for possession was passed, but on appeal it was reversed and as against the tenant-defendant the suit was dismissed with costs. The plaintiffs appeal from this decree.

The position then is his,—the plaintiffs, never having obtained possession, seek to eject the tenant-defendant on the ground that his lease has determined.

The answer made by the tenant-defendant is that though the lease of the 2nd of March, 1901, may have come to an end, still he, the defendant, is in possession of the land, and he holds it under the agreement of the 1st of May, 1901.

The first question, therefore, we have to consider is whether the agreement of 1901 is an agreement which can be specifically enforced. It is not suggested before us that it is incapable of enforcement against the lessors; all that can be argued is that the plaintiffs are persons against whom it cannot be enforced. Section 27 of the Specific Relief Act provides that “except as otherwise provided by this chapter, specific performance of a contract may be enforced against (a) either party thereto, (b) any

other persons claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract." The plaintiffs come within the description of "any other person claiming under a party by a title arising subsequently to the contract of the 1st of May, 1901," so that *prima facie* the contract can be specifically enforced against the plaintiffs. Do the plaintiffs bring themselves within the exception, that is to say, have they shown that they are 'transferees for value who have paid their money in good faith and without notice of the original contract'? It is shown that they are transferees for value who have paid money. But can it be said that they did it without notice of the original contract? In determining that, we must have regard to the fact that the tenant-defendant was, and has throughout remained, in possession and occupation. But the occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights, and if he chooses to make no inquiry of the tenant, he cannot claim to be a transferee without notice. The plaintiffs, therefore, are unable to predicate of themselves that they are persons who claim without notice of the contract of the 1st of May, 1901. That contract, therefore, is capable of specific performance against the plaintiffs, and it furnishes a complete answer to their claim for possession.

The only question then is, whether it can fairly be said that the plaintiffs have been taken by surprise. It is quite true that the contract of 1st May, 1901, is not specifically mentioned in the written statement; but it is equally true that the tenant-defendant did plead the relationship of landlord and tenant, and this was referable to that contract. Further than that, we

1913

BABURAM

BAG

v.

MADHAB

CHANDRA

POLLAY.

JENKINS C.J.

1913  
 ———  
 BABURAM  
 BAG  
 v.  
 MADHAB  
 CHANDRA  
 POLLAY.  
 ———  
 JENKINS C.J.

have the fact that this particular agreement was filed prior to the trial, and I cannot read the judgment of the Munsif without feeling that the issue, though in very general terms, was settled in reference to the preceding statement in his judgment where there is an obvious allusion to this contract on which the tenant-defendant now relies. Therefore, we cannot give effect to the suggestion that the plaintiffs were taken by surprise. I accordingly think that the decree of the District Judge should be confirmed and this appeal dismissed with costs, one set payable to the tenant-defendant.

MULLICK J. concurred.

S. M.

*Appeal dismissed.*

### ORIGINAL CIVIL.

*Before Fletcher J.*

1913  
 ———  
 Feb. 17.

### ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE Co., Ltd.

v.

### ORIENTAL ASSURANCE Co., Ltd.\*

*Trade-name—Similarity of names of Insurance Companies—"Oriental"—  
 Word known in business—Intention to deceive—Injury to plaintiff—  
 Injunction—Provident Insurance Society—Provident Insurance Societies  
 Act (V of 1912), ss. 5 and 6—Indian Life Assurance Companies  
 Act (VI of 1912)—User.*

On an application by the plaintiff company, an old, large and well known Insurance Company, registered in Bombay, and having a branch office in Calcutta, for a temporary injunction to restrain the defendant company, which was incorporated in Calcutta in November 1912, with a small share capital, but with the widest powers of doing life and other insurance

\* Original Civil Suit No. 115 of 1913.

business, though its present rules limited its life insurance business to the issue of policies for sums not exceeding Rs. 500, from using or carrying on business under the name it had adopted :—

*Held*, that, inasmuch as the term “Oriental” had become identified with the plaintiff company, an injunction should issue restraining the defendant company from using the term “Oriental” in its name, as such user would be likely to deceive the public, and the defendant company would be a source of danger to, and would be liable to cause damage to, the plaintiff company.

*Merchant Banking Company of London v. Merchants' Joint Stock Bank* (1), *Accident Insurance Company, Ltd., v. Accident, Disease and General Insurance Corporation, Ltd.* (2), and *Guardian Fire and Life Assurance Company v. Guardian and General Insurance Company, Ltd.* (3), referred to.

The circumstance that the field of operation of the defendant company was in the Orient did not entitle it to the use of the term “Oriental.”

*Hendricks v. Montagu* (4), followed.

*Rugby Portland Cement Co., Ltd., v. Rugby and Newbold Portland Cement Co., Ltd.* (5), distinguished.

*Semble* : An Insurance Company, incorporated under the Indian Companies Act, is not a Provident Insurance Society within the scope of the Provident Insurance Societies Act of 1912.

### RULE.

The plaintiff Company was a large and well known life insurance company, transacting every description of life insurance business, and was incorporated and established in Bombay in the year 1874, with a capital of Rs. 10,00,000. At the institution of this suit, its accumulated funds amounted to about Rs. 4,00,00,000; its head office was still at the Oriental Buildings in Bombay, but it had several branch offices and agencies in other important towns of India, including Calcutta. The Calcutta branch was at No. 28, Dal-housie Square.

On the 14th November, 1912, the defendant company was incorporated in Calcutta under the Indian Companies Act, with a share-capital of Rs. 20,000, divided

1913

ORIENTAL  
GOVERNMENT  
SECURITY  
LIFE  
ASSURANCE  
Co., Ltd.  
v.  
ORIENTAL  
ASSURANCE  
Co., Ltd.

(1) (1878) L. R. 9 Ch. D. 560.

(2) (1884) 54 L. J. Ch. 104.

(3) (1880) 50 L. J. Ch. 253.

(4) (1881) L. R. 17 Ch. D. 638.

(5) (1891) 8 R. P. C. 241 ;

(C. A.) 9 R. P. C. 46.

1913  
 ORIENTAL  
 GOVERNMENT  
 SECURITY  
 LIFE  
 ASSURANCE  
 Co., LD.  
*v.*  
 ORIENTAL  
 ASSURANCE  
 Co., LD.

into 2,000 shares of Rs. 10 each. Its place of business was at No. 20, Cornwallis Street. The prospectus was issued in the Bengali language, and the objects for which the company was established, as appeared from its memorandum of association, were—

- “(i) to carry on all forms of life, marriage, birth, *upanayan*, education, dower, fire, marine, accident, transit and other sorts of insurance business, and all business and work connected herewith or likely to promote the same; and
- (ii) to carry on business in all matters relating to annuities, guarantee, indemnity, allowance and provident funds by—
  - (a) granting policies, diplomas and bond-certificates;
  - (b) granting loans or other benefits to the policy-holders on the sole security of their policy, diploma or certificate of the company; and
  - (c) arranging and effecting mutual re-assurance with other assurance or provident companies in order to cover its own risks and theirs by a mutual distribution or adjustment of funds, effects, emoluments, profits, liabilities and responsibilities.”

According to its rules its life insurance business was conducted as follows : a premium of Re. 1 per month was payable by the assured for a period not exceeding fifteen years, and on the death of the assured a sum varying from Rs. 100 to Rs. 500 would become payable by the company, the figure being dependent on the actual period during which the premium had been paid.

On the 2nd December, 1912, the plaintiff company called upon the defendant company forthwith to take steps to change its name, on the ground that the

adoption of the particular name was calculated and intended to lead the public to deal with the defendant company under the impression that they were dealing with the plaintiff company, and threatened legal proceedings in default of compliance with its request. The defendant company replied, on the 9th December, that it was purely a provident fund, and that its scheme and the nature of its transactions were essentially different from those of the plaintiff company, and denied the motives ascribed to the adoption of the name.

On the 30th January, 1913, this suit was instituted by the plaintiff company, praying for a perpetual injunction, and a Rule was obtained calling upon the defendant company to show cause why a temporary injunction should not be awarded against them, restraining them from carrying on business under the name of "The Oriental Assurance Company, Limited," or any other name likely to mislead or deceive the public into the belief that the defendant company was the same as the plaintiff company, and from using the name "The Oriental Assurance Company, Limited," or any such name, and from inviting and receiving applications for shares, and from inviting applications for policies or issuing policies and from receiving monies under the name of "The Oriental Assurance Company, Limited," or any such name.

It was alleged in the plaint that the plaintiff company was commonly known and spoken of as "The Oriental" or "The Oriental Assurance Company," and apprehension was expressed that, by the use of so similar a name, the defendant company would be enabled to trade upon and use the credit and reputation of the plaintiff company and to induce persons to subscribe for shares, to insure their lives

1913

ORIENTAL  
GOVERNMENT  
SECURITY  
LIFE  
ASSURANCE  
Co., LD.  
v.  
ORIENTAL  
ASSURANCE  
Co., LD.

1913  
 ORIENTAL  
 GOVERNMENT  
 SECURITY  
 LIFE  
 ASSURANCE  
 Co., LD.  
 v.  
 ORIENTAL  
 ASSURANCE  
 Co., LD.

and otherwise to do business with the defendant company in the belief that they were dealing with the plaintiff company. Apprehension was further expressed that the plaintiff company would be injured by such use, more specially in the event of the defendant company failing to meet its obligations owing to the insufficiency of its capital which, even if fully subscribed, would be wholly inadequate for the purpose of conducting any genuine insurance business.

The application for the Rule was supported by several affidavits sworn by officers of the plaintiff company and others, to the effect that the plaintiff company was ordinarily known and addressed by abbreviated names, as "the Oriental Life Assurance Company," "the Oriental Life Office," "the Oriental Office," "the Oriental," "the Oriental Assurance Company" and "the Oriental Life Insurance Company." In an affidavit sworn by one of the Directors of the defendant company, in opposition to the Rule, it was urged that the name adopted by the defendant company was merely descriptive of the locality of its operations, that the defendant company was purely a provident insurance society, that its business was essentially different from that of the plaintiff company, and that it was impossible for any mistake or confusion to arise in the mind of the public or for the plaintiff company to be injured or prejudiced in any way.

No written statement had been filed by the defendant company when the Rule came on for disposal on the 17th February, 1913.

*Mr. P. R. Das* (with him *Mr. B. C. Mitter*), for the defendant company, showing cause. It is submitted this matter falls within the ruling in *Merchant Banking Company of London v. Merchants'*

*Joint Stock Bank* (1) where an injunction was refused. The mere similarity of the names is not sufficient to show any intention to appropriate, or any possibility of appropriating, the plaintiff company's business. No one could possibly be deceived into identifying the defendant company's business with the plaintiff company's business. The head offices are in different towns. The scheme and nature of the business are essentially different. It is impossible for the defendant company at the present moment to do the business of the plaintiff company, namely, life insurance business, properly so called, as it would necessitate a deposit of Rs. 25,000 under the Indian Life Assurance Companies Act of 1912, and the whole capital of the defendant company amounts to only Rs. 20,000. The defendant company is working under the Provident Insurance Societies Act of 1912.

[FLETCHER J. The defendant company cannot be a provident insurance society, as a provident society is not incorporated under the Companies Act, but registered or inscribed under the Provident Insurance Societies Act.]

It is submitted that the defendant company is a provident insurance society, as the definition of a provident insurance society, in section 2 of the Act, includes corporate as well as incorporate bodies. The name merely correctly describes the defendant company's business.

*Mr. B. C. Mitter* (following). An injunction was refused in similar cases in respect of insurance companies: *London and Provincial Law Assurance Society v. London and Provincial Joint Stock Assurance Company* (2), and *Colonial Life Assurance Company v. Home and Colonial Assurance Company, Ltd.* (3). In

(1) (1878) L. R. 9 Ch. D. 560.

(2) (1847) 17 L. J. Ch. (N.S.) 37.

(3) (1864) 33 Beav. 548.

1913  
ORIENTAL  
GOVERNMENT  
SECURITY  
LIFE  
ASSURANCE  
Co., LD.  
v.  
ORIENTAL  
ASSURANCE  
Co., LD.



1913

ORIENTAL  
GOVERNMENT  
SECURITY  
LIFE  
ASSURANCE  
CO., LD.  
v.  
ORIENTAL  
ASSURANCE  
CO., LD.

the latter case it was held that a monopoly could not be acquired in the user of the word "Colonial" which was a fair descriptive word: see also *India and China Tea Company v. Teede* (1) and Sebastian on Trade Marks, 5th edition, p. 287. *Manchester Brewery Co., Ltd., v. North Cheshire and Manchester Brewery Co., Ltd.* (2), *Guardian Fire and Life Assurance Co. v. Guardian and General Insurance Co., Ltd.* (3), and *Hendricks v. Montagu* (4) are distinguishable.

*Mr. Pugh*, for the plaintiff company, in support of the Rule, though not called upon, referred to *Walter v. Ashton* (5).

FLETCHER J. This is a Rule obtained by the plaintiff company, the Oriental Government Security Life Assurance Co., Ltd., against the defendants, the Oriental Assurance Co., Ltd., asking that an injunction may be granted against the defendants, restraining them, their servants and agents, until the final determination of this suit, from carrying on business under the name of the Oriental Assurance Co., Ltd., or any other name, likely to mislead or deceive the public into the belief that the defendant company is the same as the plaintiff company, and from using the name "The Oriental Assurance Co., Ltd.", or any such other name as aforesaid, and from inviting and receiving applications for the shares, and from inviting or issuing policies, and from receiving monies under the name of the Oriental Life Assurance Co., Ltd., or any such other name as aforesaid.

Now, the plaintiff company is an old well-established firm, whose head office is in Bombay, but which has a branch office in Calcutta, and for many years

(1) (1871) W. N. 241.

(3) (1880) 50 L. J. Ch. 253.

(2) [1898] 1 Ch. 539.

(4) (1881) L. R. 17 Ch. D. 638.

(5) [1902] 2 Ch. 282.

past has carried on business both in Bombay and in Calcutta. The defendant company was incorporated on the 14th November, 1912, under the provisions of the Indian Companies Act with a share-capital of Rs. 20,000, divided into 2,000 shares of Rs. 10 each, and the objects for which this company was established are, amongst other objects, to carry on all forms of life, marriage, birth, education, fire, marine, accident, transit and other sorts of insurance business and work connected therewith or likely to promote the same. It has also power to grant annuities, and issue guarantee and indemnity policies. These are very wide powers, as wide as any insurance company could possibly want, and the share-capital with which this defendant company is going to carry on this large and important business is the sum of Rs. 20,000, divided into 2,000 shares of Rs. 10 each. How many shares have, in fact, been subscribed for, out of these 2,000 shares, and how much of this Rs. 20,000 has been paid up in cash, I do not know. Now, no one has any information as to whether the whole of Rs. 20,000 or a small portion of the amount has been paid for. In order to carry on a life assurance company, that is a life assurance business, or the undertaking of liability under policies of insurance in respect of human lives, it is provided by Act VI of 1912 (Indian Life Assurance Companies Act, 1912), that an amount which would be in excess of the whole of the capital of this company has to be deposited in Government securities with the Governor-General in Council. So on the threshold of its existence this company would have to make a deposit of Rs. 25,000, that is in excess of the whole of its capital, if subscribed and paid for, with the Governor-General in Council, before it had authority to do business in accordance with the terms of its memorandum of association. It was noticed by the persons

1913

ORIENTAL  
GOVERNMENT  
SECURITY  
LIFE  
ASSURANCE  
Co., LD.  
v.

ORIENTAL  
ASSURANCE  
Co., LD.

FLETCHER J.

1913  
ORIENTAL  
GOVERNMENT  
SECURITY  
LIFE  
ASSURANCE  
Co., LD.  
v.  
ORIENTAL  
ASSURANCE  
Co., LD.  
FLETCHER J.

who assisted in giving birth to this company that there were certain exceptions to the provisions of the Indian Life Assurance Companies Act of 1912, and one of the exceptions was that nothing in the Act was applicable to any societies to which the Provident Assurance Societies Act of 1912 applies. That was an Act which was passed immediately prior to the Indian Life Insurance Companies Act, but received the assent of the Governor-General on the same day as the Life Assurance Companies Act; both received the assent of the Governor-General on the 18th March 1912. So having found out apparently that provident societies were exempted from the provisions of the Indian Life Assurance Act, the promoters of this company apparently turned back to the Provident Assurance Societies Act, and there found another exception, that nothing in that Act was to apply to societies which undertook to pay on any life policy an annuity not exceeding Rs. 50 or a gross sum not exceeding Rs. 500. They considered that by issuing policies not exceeding Rs. 500 they could bring themselves under the heading of a Provident Insurance Company and were entitled to carry on business untrammelled by the provisions of the law. That is not so, because under the Provident Insurance Societies Act the registration is to be made subject to certain conditions, which are set out in the Act, and which have to be approved of by the Registrar, and these provisions do not apply to a company which has a share-capital divided into shares. This is provided by sections 5 and 6 of the Provident Insurance Societies Act, 1912, and it is quite obvious to anybody looking at the form of the policy which this company has issued that they have simply been trying to avoid the provisions of the Indian Life Assurance Companies Act of 1912, which were intended

to prevent a company from embarking in the business of life insurance, unless and until they had the amount of cash that was necessary for them to deposit with the Governor-General in Council in order to meet their obligations. Now, the policies of this company are obviously life assurance policies, because they undertake the risk on human lives, and it does not matter whether they run for a term of 15 years or whether they are terminable by death, it is obviously a life assurance business. The plaintiff company is a life assurance company doing all classes of life business. The plaintiff company is a company with an old established business, and with a reputation which, of course, if the defendant company can take a name which will lead the public to believe that it is the plaintiff company, it is a not unfavourable asset for the defendant company to commence their business with. Probably the right to use the words "Oriental Assurance Company" is worth more than the Rs. 20,000 capital which the defendant company has. What are the grounds on which this company say they are entitled to use the words "Oriental Assurance Company"? First of all they say their company is situate in the Orient. I dare say that is so. Then, if that be so, every company in India already established now or hereafter may describe itself as "Oriental", because it is doing business in the Orient. That seems to be absurd. In *Hendricks v. Montagu* (1) a company was held not entitled to use the name "Universe." Of course, so far as every life insurance company is concerned, it must do business in the Universe; similarly every life insurance company in India must do business in the Orient. It seems to me that any argument that, because you are doing business in the Orient, you

1913  
 ORIENTAL  
 GOVERNMENT  
 SECURITY  
 LIFE  
 ASSURANCE  
 Co., LD.  
 v.  
 ORIENTAL  
 ASSURANCE  
 Co., LD.  
 FLETCHER J.

(1) (1881) L. R. 17 Ch. D. 638.

1913  
 ORIENTAL  
 GOVERNMENT  
 SECURITY  
 LIFE  
 ASSURANCE  
 Co., LD.  
 v.  
 ORIENTAL  
 ASSURANCE  
 Co., LD.  
 FLETCHER J.

are entitled to call yourselves "Oriental," without reference to what may be the rights of others, is not well-founded. There is a class of case, as the *Rugby Portland Cement Company, Ltd.*, v. *Rugby and Newbold Portland Cement Company, Ltd.* (1), where the word "Rugby" was held to be a geographical definition of the place from where the goods had come. That is a totally different case to a case where you call yourselves an Oriental company, which includes the whole of Asia. The word "Oriental" is a much wider term than the word "Rugby". That being so, on what grounds does this company say that they are entitled to carry on this Oriental Assurance Company. They say, first of all, at present, that their business is of such a small nature that they cannot possibly affect the business of the plaintiff company. That may be so for the present; until they can obtain their Rs. 25,000 to deposit with the Governor-General under the terms of the Life Assurance Act they are not entitled to issue any policies exceeding Rs. 500, but this company, if it exists, must be a source of danger to the plaintiff company. At any time, if they can obtain from any source the sum of Rs. 25,000 to deposit with the Governor-General under the Life Assurance Act, the defendant company would be able under the terms of its memorandum of association to blossom out into a fully blown life assurance company and compete with the plaintiff company, and with a name so similar that people would be likely to consider that the defendant company was in fact the plaintiff company. That is a risk which I think the plaintiff company ought not to be liable to. The defendant company says it has an Oriental origin or existence, and for that reason they are using the word "Oriental." There are heaps of other words, if they wish to show that it is of an

Indian origin, and one cannot say why the words "Oriental Assurance Company" have been hit upon, except that there is a well-known and well-established business which has gained the confidence of the people of this country, and the defendant company hope that that reputation would descend to them under the title of the Oriental Assurance Company.

It seems to me in this case, notwithstanding the cases that have been cited by Mr. Mitter and his learned junior, that an injunction ought to be granted. No doubt there are cases where injunctions have not been granted, but there are other cases where, the company being an insurance company, injunctions have been granted, as the case of *Merchant Banking Company of London v. Merchants' Joint Stock Bank* (1). There is the case of *Accident Insurance Company, Limited v. The Accident, Disease and General Insurance Corporation, Ltd.* (2). There is also a case of *Guardian Fire and Life Assurance Company, Ltd., v. Guardian and General Insurance Company, Ltd.* (3). Both these cases are cases where a portion of the title of a well-known insurance company was taken by a new company, and there cannot be much doubt why those names were taken. It seems to me in this present case that this small company, brought into existence in this way, and starting this business in this manner, to avoid responsibility that was cast upon it by law before it can commence business contemplated in the articles of association, is liable to deceive people that it is the old and well-established company. It is said that people make a very careful examination into the affairs of the life insurance companies before they insure their lives. That may be so with reference to some cases. In the case of companies

1913  
 ORIENTAL  
 GOVERNMENT  
 SECURITY  
 LIFE  
 ASSURANCE  
 Co., LD  
 v.  
 ORIENTAL  
 ASSURANCE  
 Co., LD.  
 FLETCHER J.

(1) (1878) L. R. 9 Ch. D. 560.

(2) (1884) 54 L. J. Ch. 104.

(3) (1880) 50 L. J. Ch. 253.

1913

ORIENTAL  
GOVERNMENT  
SECURITY  
LIFE  
ASSURANCE  
CO., LD.  
v.

ORIENTAL  
ASSURANCE  
CO., LD.

FLETCHER J.

like the Law Life and the Equity and Law Life, which appeal to a certain class of persons, viz., the members of the legal profession, persons intending to assure probably investigate more carefully into the affairs of the companies than the class of people to whom the Oriental Assurance Company would appeal, and who take Re. 1 per month for a period of fifteen years from the persons taking out policies. They must obviously be Indians in more or less humble positions, at any rate not of a highly educated class, probably men in the ordinary walks in life, and who probably do not know the meaning of the word "Oriental," but who, knowing that there is a well-established office in Calcutta of the plaintiff company, might be liable to think that this new form of policy was being issued by the plaintiff company. It seems to me that, taking into consideration also the risk that there is of this company blossoming out as a full grown life assurance company, issuing life policies to any amount, the plaintiffs are right in thinking that there is a real danger of their suffering irreparable loss if this company is not restrained by an injunction.

Then the other point made by Mr. Mitter is that this small company is carrying on business at No. 20, Cornwallis Street, and that nobody is likely to think that this small company, in No. 20, Cornwallis Street, is likely to be the old and well-established concern in Dalhousie Square. So far as that goes, the Oriental Assurance Company, that is, the defendant company, on its policies very carefully conceals its address, and it gives no address at all, but dresses up the matter in this way. At one corner of the policy there is a blank for the number, and at another corner the word "Agency", as if this company of No. 20, Cornwallis Street has several agencies throughout British India, obviously intending the public to think that it was a

big company with several agencies. It is quite obvious that the defendant company carrying on business in this way is liable to cause damage to the plaintiff company. It seems to me, so far as I can see, that the word "Oriental" has become identified, when applied to a life assurance company, with the plaintiff company, which has now been in existence for many years, and they are now known as the "Oriental Office." In the circumstances, I think the present Rule ought to be made absolute, and the defendant company restrained from using the name "Oriental" until the trial of the suit. There is nothing to prevent the defendant company from applying to the Registrar of Joint Stock Companies to alter its name, so that it may show that it is a company of an Indian origin carrying on a sort of life assurance business; but, as I have already said, the business carried on by the defendant company is illegal, and not in accordance with Acts V and VI of 1912. In my opinion it ought to make a deposit of Rs. 25,000 with the Governor-General, under Act VI of 1912, before it can issue the policies that it is now issuing. On these grounds the present Rule should be made absolute, and the defendant company restrained until the trial of the action from using the words "Oriental Assurance Company." Costs of the present application to be made costs in the suit, and the plaintiff company must give an undertaking as to damages.

1913  
 ORIENTAL  
 GOVERNMENT  
 SECURITY  
 LIFE  
 ASSURANCE  
 Co., LD.  
 v.  
 ORIENTAL  
 ASSURANCE  
 Co., LD.  
 FLETCHER J.

*Rule absolute.*

Attorneys for the plaintiff company : *Orr, Dignam & Co.*

Attorney for the defendant company : *J. N. Mitter.*  
 J. C.

[The defendant company failed to appear at the hearing of the suit, and a decree was made ordering a perpetual injunction. ED.]



**CRIMINAL REVISION.***Before Holmwood and Chapman JJ.***DURGA PROSAD PATHAK***v.***LACHMAN BANIA.\*****1913****Feb. 20.**

*Sanction for Prosecution—Second sanction—Criminal Procedure Code (Act V of 1898), s. 195—Subsequent order, only a repetition of the first order—Revival of proceedings—Penal Code (Act XLV of 1860), ss. 193, 471—Limitation.*

Where there are two orders purporting to grant sanction to the same prosecution, the later order will ordinarily be taken to be merely a repetition of the first, and the period of limitation will begin to run from the date of the first order.

*Darbari Mundar v. Jagoo Lal* (1) referred to.

THE facts of the case are briefly these. One Durga Prosad Pathak instituted a suit in the Calcutta Court of Small Causes against Lachman Bania for recovery of Rs. 350 on a bond. The learned Judge, holding that the alleged signature of the defendant on the bond was a forgery, dismissed the suit on the 30th of April, 1912. Thereupon, Lachman Bania applied for and obtained from the learned Judge an order sanctioning the prosecution of the plaintiff under s. 471 of the Penal Code. On obtaining the order he, on the 29th of July, 1912, applied for process before the Chief Presidency Magistrate, who called for witnesses and the record of the case in the Court of the Calcutta Court of Small Causes, and fixed the hearing of the application for the 6th of August 1912.

\* Criminal Revision No. 1 of 1913.

In the meantime Durga Pathak moved the High Court and obtained a stay order of the proceedings against him in the Police Court pending the hearing of the Rule, which was subsequently discharged.

Then Durga Pathak made a fresh application to set aside the sanction granted by the Calcutta Court of Small Causes, but the Divisional Bench, on the 27th of July, 1912, rejected his application. "

On the 29th of July, Lachman Bania obtained a summons against Durga Pathak under ss. 193 and 471 of the Indian Penal Code. The summons was made returnable on the 30th of August, 1912.

While this case was pending before the Chief Presidency Magistrate, Lachman Bania applied to the learned Judge of the Calcutta Court of Small Causes to pass a formal order of sanction in the manner prescribed by law, and the learned Judge granted his application on the 6th of September, 1912.

On the 11th of September, 1912, Lachman Bania applied to the Chief Presidency Magistrate that he might be permitted to withdraw the case then pending against Durga Pathak, with liberty to apply for process afresh, and the Chief Presidency Magistrate, on the 16th of September, 1912, passed the following order:—"Summons withdrawn. Application dismissed."

On the 16th of September, Lachman Bania applied for fresh process against Durga Pathak on the basis of the order of the learned Judge of the Small Cause Court, passed on the 6th of September, 1912, and obtained summons under ss. 471 and 193 of the Indian Penal Code.

Against this order of the learned Chief Presidency Magistrate Durga Pathak moved the High Court, and obtained this Rule.

1913

DURGA  
PRASAD  
PATHAK  
v.  
LACHMAN  
BANIA.

1913

DURGA  
PROSAD  
PATHAK  
v.  
LACHMAN  
BANIA.

*Mr. Asghur and Babu Tarakeswar Pal Chowdhry* for the petitioner, submitted that it was not competent to the Chief Presidency Magistrate to issue process on the basis of the order of sanction granted by the learned Judge of the Court of Small Causes on the 6th of September. It was contended that that was a second sanction, and as such it was inoperative, proceedings under the first sanction having terminated on the 16th of September in the dismissal of the application of Lachman Bania; and that so long as the dismissal of the 16th of September was not set aside by this Court, the Magistrate was not empowered under the law to proceed under the second sanction.

*Darbari Mandar v. Jagoo Lal* (1) relied upon.

*Mr. P. L. Roy, Mr. Khuda Bulhsh and Babu Chandra Sekhar Banerjee*, for the opposite party, were not called upon.

HOLMWOOD AND CHAPMAN JJ. This Rule was issued upon four grounds: *first*, that the Small Cause Court had no power to grant a subsequent sanction, one having already been granted on the 27th July, 1912, which sanction had not been cancelled by a higher Court; *secondly*, that the Small Cause Court had no jurisdiction in granting a second sanction without giving any notice to the petitioner; *thirdly*, that the Small Cause Court Judge acted without jurisdiction in granting a second sanction, inasmuch as a prosecution was started and was pending in the Police Court upon the first sanction; and, *fourthly*, that the second sanction was illegal, inasmuch as it extends the period of limitation, which is to be calculated from the original date of sanction.

As regards the first three grounds, it is only necessary to point out that there was no second sanction,

and all the rulings which have been cited to us by the learned counsel, of which we need only refer to that in the case of *Darbari Mandar v. Jagoo Lal* (1), clearly lay down that there can be no second sanction, and that any subsequent order purporting to be a second sanction must be taken to be nothing more than a repetition of the first, and that the period of limitation will run from the date of the first sanction.

The fourth ground is that by this alleged second sanction the period of limitation is extended; but as we have just pointed out it is not extended in any way. But the question does not arise in this case, because, as a matter of fact, the revival of proceedings in the Criminal Court took place within two months of the original sanction. As regards the question of the propriety of the revival of the Criminal Court, that was considered by the learned Judges who issued the Rule. It formed the fifth ground of the petition, and the learned Judges, after considering, rejected it and did not issue any Rule. That question, therefore, can not be raised again.

We are bound to hold that the Presidency Magistrate was within his jurisdiction in reviving these proceedings, as it appears clear on the record that he was, and the Rule must be discharged simply on the ground that there was no second sanction, and that the proceedings were taken within the period of limitation.

S. K. B.

*Rule discharged.*

(1) (1895) I. L. R. 22 Calc. 573.

1913  
DURGA  
PROSAD  
PATHAK  
v.  
LACHMAN  
BANIA.

**APPEAL FROM ORIGINAL CIVIL.***Before Jenkins C J., Harington and Mookerjee JJ.*

1913

Feb. 21.

IN THE MATTER OF PROVAS CHANDRA ROY.\*

*Pleadership Examination—Candidate—Examiners—Specific Relief Act  
(I of 1877) ss. 45,46—Mandamus—Discretion.*

In making an application under s. 45 of the Specific Relief Act, the provisions of s. 46 must be strictly observed, and in dealing with such an application the principles applicable to a writ of *mandamus* should generally be followed.

*Bank of Bombay v. Suleman Samji* (1) referred to.

APPEAL by the members of the Board of Examiners of the Pleadership and Mukhtearship Examinations from the judgment of Imam J.

This appeal arose out of an application under section 45 of the Specific Relief Act, by Provas Chandra Roy, a candidate for the Pleadership Examination, for an order against the Board of Examiners.

It appears that the petitioner presented himself at the Pleadership Examination held in February, 1912. Shortly after the conclusion of the examination and while the answer papers were under correction, the petitioner, in common with twenty-nine other candidates, attempted to substitute with an examiner, by the offer of a bribe, fresh answer papers in the place of the ones originally written at the examination.

The examiner having reported the matter to the Board of Examiners, an enquiry was held in the month of June, 1912, and the candidates, including the petitioner, confessed that they were guilty of the charge made against them. The Board, thereupon,

\* Appeal from Original Civil No. 7 of 1913.

(1) (1908) I. L. R. 32 Bom. 466.

decided that the thirty candidates should be disqualified for the examination of 1912.

1913

PROVAS  
CHANDRA  
ROY, *in re.*

On the 26th July, 1912, the usual report on the examination was submitted to the Government of Bengal by the President of the Board, with a recommendation that these thirty candidates should be debarred from appearing at the Pleadership Examination in the future, either absolutely or for a period of five years. By a reply, dated the 5th November, the Government agreed with the view of the Board that the thirty candidates should not be allowed to appear at the examination for five years.

Thereupon the following notification appeared in the *Calcutta Gazette* of the 27th November, 1912:—

“In pursuance of the order contained in the letter of the Secretary to the Government of Bengal, Judicial Department, dated the 5th November, 1912, it is hereby notified that the following candidates have been debarred from taking part in the Pleadership and Mukhtearship Examinations for a period of five years, *i. e.*, from 1913-1917, both inclusive.” A list was annexed of the names of the thirty candidates, including that of the petitioner. At the foot of the notice which was dated the 23rd November 1912, appeared the name of W. Graham, Secretary, Pleadership and Mukhtearship Examination Board.

Some time in November 1912, previous to the appearance of the notification in the *Calcutta Gazette*, the petitioner applied for permission to appear at the Pleadership Examination of 1913, depositing the prescribed fee and certificate of character with the District Judge of Alipore. The application was duly forwarded to Mr. Graham, and was refused.

Thereupon, Provas Chandra Roy applied under section 45 of the Specific Relief Act for, (i) an order that the Board of Examiners acted illegally in not

1913

PROVAS  
CHANDRA  
ROY, *In re.*

publishing petitioner's name in the list of successful candidates; (ii) a declaration that petitioner has passed the Pleaders' Examination in 1912, and his name should be gazetted as a successful candidate; (iii) a declaration that the order of November, 1912, appearing in the *Calcutta Gazette* of the 27th November, 1912, which was passed by the Board of Examiners or by the local Government, was illegal and *ultra vires*; (iv) a declaration that the Board of Examiners have acted illegally in not entertaining petitioner's application and his certificate of character, and not allowing him to appear at the ensuing examination for 1913.

The grounds alleged in the petition were: *first*, that the petitioner had obtained the requisite number of marks in his original answer papers to pass the examination of 1912, and that neither the Board of Examiners nor the local Government could legally prevent his name being published as a successful candidate at that examination; *secondly*, that the resolution of the Board, and the notification in the *Gazette*, debarring him from appearing at the examination for five years were *ultra vires*; and, *thirdly*, that the petitioner was entitled to have his application for permission to appear at the examination of 1913 considered on its merits, irrespective of the resolution and notification.

On this application, a Rule was obtained on the 15th January, 1913, from Imam J. in the following terms: "It is ordered that the Board of Examiners of Pleaders' and Muktearship examinations . . . shew cause before this Court why they should not publish the name of the said Provas Chandra Roy in the list of successful candidates of the last year's Pleaders' Examination, or why the said Provas Chandra Roy should not be allowed to appear at the next Pleaders' Examination, he having fulfilled the

conditions necessary under the law qualifying him to appear at such examination.”

This Rule was in the form adopted in *In the matter of Rudra Narain Roy* (1).

In his affidavit in opposition to the Rule, Mr. Graham, Secretary to the Board, stated that the petitioner had in fact failed to secure the necessary marks to entitle him to pass the examination of 1912, and that on the application of the petitioner for permission to appear at the examination of 1913 being forwarded to him, he, on behalf of the Board, under rule 15 of the rules and regulations relating to the Pleadership and Muktearship Examinations, considered the application and determined that the candidate was not duly qualified, on the ground of want of moral character, and he accordingly refused to allow him to appear at the examination. Exception was further taken to the nature of the relief claimed as being unobtainable under section 45 of the Specific Relief Act.

On the Rule coming on for hearing on the 20th February, 1913, IMAM J. ordered that “the Board of Examiners do entertain and consider the petitioner’s application and determine his fitness according to their discretion.” After setting out the facts, his Lordship observed as follows :—

“The first part of the Rule, *namely*, why the petitioner’s name should not be published in the list of the successful candidates of the last year’s Pleadership Examination, was based on the petitioner’s statement contained in paragraph 14 of his petition. The Secretary to the Board, Mr. Graham, however, denies the correctness of the petitioner’s statement and definitely states that the petitioner has not secured the necessary pass marks. The statement of Mr. Graham is not challenged, and that part of the Rule therefore must fail.

“In respect of the second part of this Rule, the petitioner maintains his complaint that under the rules by which the Board are guided they have no power to stop him from appearing at an examination without entertaining

1913

PROVAS  
CHANDRA  
ROY, *In re.*



1913

PROVAS  
CHANDRA  
Roy, *In re.*

his application and considering it. In the matter of permission to candidates to sit at a Pleaders' Examination, the powers of the Board are regulated by rules framed by the High Court under Section 6 of Act XVIII of 1879, and in the matter of conducting the examination their powers are governed by regulations made by the Lieutenant-Governor of Bengal under section 37 of Act XVIII of 1879. The rule pertinent to the present case is contained in rule 15, which runs thus :—'The examiners shall, on receipt of the applications from the District Judge take the case of each candidate, with the report of the District Judge, into their consideration, and shall determine whether or not the candidate is possessed of the necessary qualifications. If the candidate is found qualified, the examiners shall cause his name, name of his father, his age and place of residence and other needful particulars to be entered in a register of persons permitted to appear at the examination.' The regulation framed under section 37 that need be at all considered in connection with this case is regulation 13, which runs thus :—'No candidate will be allowed to enter the examination room with any books, private memoranda or paper of any description, and any one detected doing so will forfeit all fees paid by him and will not be permitted to undergo the examination. Any candidate detected in the act of using unfair means, such as communicating with another, or copying from his neighbour, or from private memoranda or books, etc., will be summarily ejected from the examination room, and will forfeit all benefit to be derived from the previous portion of the examination, and all right to proceed further with it, together with all fees paid by him.'

"Neither the rules nor the regulations have provided for a case of such an unusual nature as the one under consideration. The reprobation of such misconduct as is admitted by the petitioner may be, and in my opinion is, necessary in the interests of the litigant public and society generally, but such reprobation must conform to the prescribed rules. The order prohibiting the offending candidates from appearance at the examinations for a period of five years is one of rustication, for which there is no legal sanction, and whatever moral warrant there may be for such an order, an insistence on the Board acting within their powers has to receive attention. In this connection aptly may be quoted the words of Lord Chancellor Cottenham in *Frewin v. Lewis* (1) :—'The limits within which the Court interferes with the acts of public functionaries are clear and unambiguous. So long as they confine themselves within the exercise of those duties which are confided to them by law, the Court will not interfere. The Court will not interfere to see whether any alteration or regulation they may direct is good or bad ; but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law

(1) (1838) 4 Mylne & Craig 249, 254.

does not give them, the Court will no longer consider them as acting under the authority of their commission, but treat them, whether they be a corporation or individuals, merely as people dealing with property without legal authority.'

"My attention has been drawn to a case similar to this, *In the matter of Rudra Narain Roy* (1), which in principle applies here, though the circumstances are different.

"Mr. Graham, in paragraph 7 of his affidavit states thus :—'I, on behalf of the Board, according to paragraph 15 of the rules of the Board, considered it (the application) and determined that the candidate was not duly qualified and accordingly I refused to allow him to appear, as he had no moral character.' This is all that has been said on behalf of the Board in respect of their satisfying the provisions of rule 15, and it seems to me that it is not enough. The language of that rule is preceptive, and makes it obligatory on the Board themselves to consider the application of each candidate and to determine whether or not the candidate is possessed of the necessary qualifications. It is quite clear from the statement of Mr. Graham that the Board have not done so, but he did it on their behalf. There is no provision either in the rules or the regulations to enable the Board to delegate their powers to the Secretary of the Board, or to any single member. Had the Board themselves in the present instance considered the fitness of the candidate and decided whichever way their discretion led them, it would not have been open to this Court to entertain an application against their decision.

"On behalf of the Board, objection is taken to the form of the Rule, but I hold that it is comprehensive enough for the order that I make in the case."

From this judgment and order the members of the Board of Examiners appealed.

*Mr. B. Chakravarti* (with him *Mr. Pearson*), for the appellants. The Court of first instance should not have exercised the discretion allowed by section 45 of the Specific Relief Act in favour of the petitioner, who was guilty of such gross misconduct. Apart from the merits of the matter, the Rule and petition are so radically bad in form as to vitiate the application. The first objection, which, however, the appellants desire to waive, is that the Rule has been issued against the "Board of Examiners," which has no corporate

1913

PROVAS  
CHANDRA  
ROY, *In re*.

1913

PROVAS  
CHANDRA  
ROY, *In re*.

being, and has been served on the Secretary, instead of having been issued against and served on the examiners individually. *Secondly*, the relief claimed is by way of declarations, which is not contemplated by, and not directed under, section 45. *Thirdly*, the rule obtained is not within the terms of the relief claimed. Moreover, the order made is at variance with the relief claimed and the Rule.

*Mr. S. P. Sinha* (with him *Mr. H. D. Bose* and *Mr. Asghur*), for the respondent. It is admitted the misconduct of the petitioner was grave: but the punishment is severe. The petition is undoubtedly irregular in form, but at the time of applying for the Rule I intimated to the Court of first instance that the relief sought was that the examiners be ordered to consider the petitioner's case. The Secretary cannot act for the body of examiners, under rule 15. The Rule and order were framed in the terms adopted in *In the matter of Rudra Narain Roy* (1).

[JENKINS C. J. I confess I do not understand that decision.]

The requirements of section 46 are substantially fulfilled by the letter to the Secretary, which is set out in the petition. It is true there is no further affidavit. The local Government had no power to issue the notification in the *Calcutta Gazette*, and, it is submitted, if the examiners observe or carry out an illegal order, relief can be obtained against them. Under rule 15 the whole body of examiners must take into consideration the case of each applicant on each occasion: they cannot consider themselves bound by the notification.

*Mr. Chakravarti*, in reply. It is unnecessary for me to discuss whether the notification of the Government is legal or binding or not, or whether or not it

should affect the examiners of subsequent years. The present application should fail, and the appeal be allowed.

1913  
PROVAS  
CHANDRA  
ROY, *In re*.

JENKINS C.J. This appeal arises out of an application under Chapter VIII of the Specific Relief Act. Section 45 of that Act enables this Court to order public servants and others to do certain specific acts, and section 46 indicates how the application is to be made, and the procedure thereon. The present applicant is one who was examined last year for the pleadership examination, and in connection with that examination he was found to have been guilty of grave misconduct. Notwithstanding this, he now seeks to be admitted to this year's examination, and, his claim being disallowed, he has presented a petition under section 45 of the Act. He has succeeded in obtaining an order in these terms, "that the Board of Examiners do entertain and consider the application of Provas Chandra Roy, and determine his fitness according to their discretion." From that order, what has been called the 'Board of Examiners'—that, I presume, means the Examiners,—have appealed; and, at the outset, it is urged that this application must fail, as it is opposed to the terms of the Specific Relief Act, and as the order is at variance with that for which the applicant prayed and with the Rule that issued.

By his petition, the applicant prays first for an order that the Board of Examiners acted illegally in not publishing the petitioner's name in the list of successful candidates, that is, the list of the successful candidates at last year's examination: next, that it may be declared that the petitioner has passed the Pledership examination in 1912, that his name should be gazetted as a successful candidate, or, it may be declared that the order of November, 1912,

1913  
PROVAS  
CHANDRA  
ROY, *In re*.  
JENKINS C.J.

appearing in the *Cilcutta Gazette* of the 27th November, 1912, which was passed by the Board of Examiners of the Pleadership and Mukhtearship examinations, or by the local Government, is illegal and *ultra vires*: and, finally, that it may be declared that the Board of Examiners have acted illegally in not entertaining the petitioner's application, and his certificate of character, and not allowing him to appear at the ensuing examination for 1913. Not one of these prayers is justified by the terms of the Act, and this application must have been drawn up without reference to the relevant sections. They are clear in their terms: section 45 enables the Court to make an order requiring any specific act to be done or forborne, and nothing else: section 46 provides that the application must be founded on an affidavit of the person injured, stating his right, his demand of justice and the denial thereof. All this has been completely disregarded, not only in form but in substance. But on these materials the applicant obtained a Rule in these terms:—"It is ordered that the Board of Examiners for Pleadership and Mukhtearship examinations, being served with this order on or before the eighteenth day of January instant, do on Wednesday the twenty-second day of January instant, at the hour of eleven o'clock in the forenoon, show cause before the Court why they should not publish the name of Provas Chandra Roy in the list of successful candidates of the last year's Pleadership examination, or why the said Provas Chandra Roy should not be allowed to appear at the next Pleadership examination, he having fulfilled the conditions necessary under the law qualifying him to appear at such examination." At the hearing of the Rule an order was made in the terms I have stated. That order is at variance with the prayer in the petition, and with

the Rule that was granted. But in dealing with an application under Chapter VIII of the Specific Relief Act, the principles applicable to a writ of *mandamus* should, generally speaking, be followed, and it was laid down by the Privy Council in *The Bank of Bombay v. Suleman Somji* (1), that "one of the principles is that the writ will not be allowed to issue unless the applicant shows clearly that he has the specific legal right, to enforce which he asks for the interference of the Court; that he has claimed to exercise that right and none other, and that his claim has been refused." This is in substantial accord with section 46 of the Act. When it was put to the learned counsel who appeared for the petitioner whether he could point to the prescribed demand of justice, and the denial thereof, it was admitted that it was only by a very liberal reading of certain passages in the petition that any suggestion of that demand and denial could be made. Even if we could, I do not think we should overlook these defects. The present applicant is not a person in whose favour we ought to strain the jurisdiction that has been invoked. It is an inadequate description to say he does not come to the Court with clean hands; he admits his own turpitude and comes here with peculiarly dirty hands, so that I see no reason for making the slightest concession in his favour. In my opinion, it would be wrong to uphold the order that has been made, and I therefore hold that this appeal must be allowed, and the application dismissed with costs in both the Courts.

HARINGTON J. I agree.

MOOKERJEE J. I agree.

J. C.

*Appeal allowed.*

Attorney for the appellants: *C. H. Kesteven.*

Attorney for the respondent: *K. N. Dey.*

1913  
PROVAS  
CHANDRA  
ROY, *In re.*  
JENKINS C.J.

## PRIVY COUNCIL.

P.C.<sup>2</sup>  
1913

Feb. 6, 7,  
25.

KANHAYA LAL

v.

NATIONAL BANK OF INDIA, LD.

## [ON APPEAL FROM THE CHIEF COURT OF THE PANJAB, AT LAHORE.]

*Voluntary Payment—Suit to recover money paid under decree—Wrongful interference of defendant—"Coercion"—Contract Act (IX of 1872), ss. 15, 69, 70, 72. Illus. (b)—Civil Procedure Code, 1882, ss. 278 et seq.—Claims to attached property—Money paid under compulsion—Money paid under process of decree against third person.*

The appellant (plaintiff) stated in his plaint that he was the proprietor of the Delhi Cotton Mills against which the respondent Bank (defendant) had an unsatisfied decree; that the respondent on 15th August, 1902, applied for the attachment of the property and premises of the mills wrongfully stating that they were the property of the Delhi Cotton Mills Company, attached the property on 20th August, 1902, knowing that it belonged to the plaintiff, and dispossessed him; that "he has suffered considerable damage by the said acts of the defendant, and as he was by such acts practically ousted from all the machinery and mills and could not work them, and the whole of such damage would be very considerable, and part of it most difficult to prove, and it was probable that by objection to such attachment under the Civil Procedure Code a considerable time would elapse before he could obtain an order setting aside the attachment, the plaintiff was compelled to pay the balance due to the defendant under the decree against the Delhi Cotton Mills Company under protest on 27th August, 1902." In a suit brought for a return of the money so paid, and damages for the alleged illegal acts of the defendant, the defence (*inter alia*) was that the "suit as framed would not lie," and the case was argued on a preliminary issue, the proceedings being of the nature of a demurrer.

*Held* (reversing the decision of the Courts in India), that the plaintiff was entitled to recover the money so paid as being an involuntary payment produced by coercion, namely, the wrongful interference of the defendant with his full and free enjoyment of his own property.

*Dulichand v. RamKishen Singh* (1) followed.

The fact that the sale was not inevitable in the present case was not relevant. The greater or less probability of a sale taking place did not affect the *ratio decidendi* in that case, which is that the payment was made under the force of the execution proceedings, and that in India, as in England, such a payment is regarded by the law as being made under compulsion.

The procedure provided in the Civil Procedure Code referring to claims to attached property (section 278 *et seq.*) is merely permissive, being analogous to the procedure by interpleader in Eng'land. But the fact that such a procedure is open to him if he chooses to adopt it, in no way interfered with the plaintiff's right to take any other lawful alternative.

Section 72 of the Contract Act (IX of 1872) is not exhaustive. The meaning of the word "coercion" used in that section is not controlled by the definition in section 15 ; but is used in its general and ordinary sense. The definition in section 15 is expressly inserted for the special object of applying to section 14, *i.e.*, to define what is the criterion whether an agreement was made by means of a consent extorted by coercion, and does not control the interpretation of "coercion" when the word is used in other surroundings.

Sections 69 and 70 of the Contract Act do not refer in any way to remedies against the wrongdoer, and are therefore irrelevant to the question raised in this appeal.

APPEAL from a judgment and decree (27th January, 1911) of the Chief Court of the Panjab which affirmed a judgment and decree (18th November, 1902) of the District Judge of Delhi.

The plaintiff was the appellant to His Majesty in Council.

This case had come before their Lordships of the Judicial Committee at an earlier stage which will be found reported in I. L. R. 37 Calc. 426, where the facts and pleadings are stated. By the judgment of the Judicial Committee then given (9th March, 1910) the case was remanded to the Chief Court; and their Lordships state in their judgment in the present appeal that that Court, on the remand, rightly treated the case

1913

KANHAYA  
LAL  
v.  
NATIONAL  
BANK  
OF INDIA,  
LTD.



1913  
KANHAYA  
LAL  
v.  
NATIONAL  
BANK  
OF INDIA,  
LD.

as being an appeal from an order dated 18th November, 1902, by which the District Judge had on a preliminary issue dismissed the present appellant's (plaintiff's) case on the ground that on the facts stated in the plaint he had no cause of action.

Those facts as stated by the District Judge may conveniently be shortly set out here as follows:—

“The allegations of the plaintiff are that he, to the knowledge of the defendants, has been proprietor, since June 25th, 1902, of the property and premises of the mills generally known as the Delhi Cotton Mills, Limited, against whom the defendants had an unsatisfied decree. The plaintiff further alleges that the defendants applied on 15th August, 1902, for the attachment of the said property and premises, wrongfully stating that they were the property of the said company, and got the said property attached, knowing that it belonged to the plaintiff, on 20th August, and dispossessed the plaintiff of his property. The plaintiff states (in paragraph 7 of his plaint) that he ‘has suffered considerable damage by the said acts of the defendant, and as he was by such acts practically ousted from all the machinery and mills, and could not arrange for the working thereof, and could not work them, and the whole of such damage would be very considerable and part of it most difficult to prove, and it was probable, that, by objection to such attachment under the Civil Procedure Code, a considerable time would elapse before he could obtain an order setting aside the attachment, the plaintiff was compelled to pay the balance due to the defendants under their decree against the Delhi Cotton Mills Company, under protest, on 27th August, 1902. The amount so paid is Rs. 83,005.’ ”

The District Judge in his judgment dealt exhaustively with the arguments and authorities, and, after

an elaborate discussion of them, arrived at the following conclusions, (a) that there was no "coercion" on the part of the defendants, and that the suit was not maintainable under the provisions of the Indian Contract Act; (b) that the provisions of the said Act, as contained in section 72, were not exhaustive, and did not debar the plaintiff from claiming on the count of "money had and received," if his allegations in the plaint supported any such plea; and (c) that in the present case, upon the plaintiff's own allegations the plaintiff was not compelled to pay the money into Court, inasmuch as he could have objected to the attachment of the property, and the payment made by him was so made to suit his own convenience, after balancing the personal advantages to be gained by immediate payment or objecting.

The District Judge accordingly held that the defendant's preliminary objection must be upheld, and that as the payment made by the plaintiff was voluntary, he could not sue for recovery of the sum so paid.

This was the decision, therefore, with which the Chief Court (JOHNSTONE and RATTIGAN JJ.) after the remand by their Lordships of the Judicial Committee as abovementioned, dealt with on appeal.

The Chief Court, after considering the arguments and the authorities cited, said, "We see no reason to differ from the conclusion arrived at by the District Judge, though we do not agree with him that section 72 of the Contract Act is not exhaustive with regard to claims such as that now before us," and after referring to extracts from the judgments of the Judicial Committee in the cases of *Irrawaddy Flotilla Company v. Bugwan Das* (1), and *Mohori Bibee v. Dharmodas Ghose* (2), and to the case of *Freeman v. Jeffries* (3)

(1) (1891) I. L. R. 18 Calc. 620, (2) (1903) I. L. R. 30 Calc. 539,  
628, 629. 548 : L. R. 30 I. A. 114, 115.

(3) (1869) L. R. 4 Exch. 189.

1913  
 KANHAYA  
 LAL  
 v.  
 NATIONAL  
 BANK  
 OF INDIA,  
 LD.

per MARTIN B., and giving their reasons for thinking that section 72 was exhaustive, the Chief Court's judgment continued :—

“ It seems to us, therefore, that the plaintiff, in order to succeed in the present case, must show that he paid the money into Court on 27th August, 1902, as the result of ‘ coercion ’ within the meaning of section 15 of the Indian Contract Act . . . . . The question then is whether upon the allegations in the plaint there was any such ‘ coercion ’ ”.

After reading the allegations referred to (see *ante* p. 600) the judgment proceeded :—

“ In our opinion, an action of this kind, if it is to succeed, must come within the purview of section 72 of the Act. But even if this be not so, we are nevertheless of opinion that in the case before us the payment made by plaintiff was ‘ voluntary.’ He was certainly not obliged to pay the money into Court, nor, at the time when the money was so paid, were the circumstances such that the plaintiff, if he wished to save his property, had no alternative to making the payment. The property, no doubt, was attached, but there was no order for sale, and under the law, the plaintiff was entitled if he so thought fit, to object to the attachment, or (if he preferred) to institute a suit for a decree declaratory of his rights thereto. In either event he would have had no difficulty in securing from the Court an order staying all further proceedings in execution until his claim had been considered. Even if his objections to the attachment had been overruled, it would still have been open to him to bring a regular suit, and we have no reason to suppose that the Court would not have taken steps to protect his alleged rights until the question of his title had been determined. In his plaint, plaintiff candidly admits that he could have lodged objections to the attachment, but he urges that it was probable that by ‘ objection to such attachment, a considerable time would elapse before he could obtain an order setting aside such attachment.’ In order, therefore, to suit his own convenience, he decided that it would be more in his interests to forthwith pay the money due to the decree-holders, and he accordingly elected, of his own free volition, to take that course. How can we reasonably hold that this action was forced upon him ? Had he adopted the procedure prescribed by the Civil Procedure Code he might have been put to loss, but for this loss he would have been entitled to recover damages from the defendants. But, for reasons of his own, he paid up the money and so satisfied the defendants’ decree. He has apparently a good case against the judgment-debtors under sections 69 and 70 of the Indian Contract Act. But he has elected to satisfy the defendants’ decree, and as he has by so doing induced them to forego all further proceedings against their judgment-debtors, is it reasonable or equitable that he should

now be allowed to get back his money from the decree holders and leave them, at a late stage, to such remedies as they may have against the judgment-debtors? *Restitutio in integrum* at this stage is probably impossible, and for this the plaintiff, and not defendants, must be held responsible. Had he, in the first instance, taken the usual course of objecting to attachment of property which he claimed to be his, the Court would have proceeded to investigate his claim and the party aggrieved by its order would have been entitled to bring a regular suit for the final determination of the questions at issue. Plaintiff, however, was of opinion that this course was inconvenient to him, and on that ground elected to pay off the decree.

"It seems to us that the circumstances of this case differ materially from those in cases where a plaintiff has been held entitled to recover monies paid by him in order to stave off an imminent sale of property. In the latter class of cases the person who pays money in order to avert a sale which would otherwise inevitably take place has no alternative to the payment of such money, and [in the words of their Lordships of the Privy Council in *Dulichand v. Ram Kishen Singh* (1)] 'he may bring an action to recover back the money he has so paid; it is the compulsion under which they are about to be sold that makes the payment involuntary.' In this case, the plaintiff had objected to the attachment of the properties. His objections were overruled and he was, therefore, compelled to pay the money in order to prevent the sale which (in their Lordships' words) 'would otherwise inevitably have taken place.'"

And after distinguishing the case of *Fatima Khatoon v. Mahomed Jan Chowdhry* (2), which had been cited for the plaintiff, the judgment of the Chief Court concluded as follows:—

"We have been referred to no authority in support of the proposition that (apart from section 72 of the Indian Contract Act) a person who, without objecting to an attachment of property claimed by him, pays the decretal amount into Court in order to relieve himself of the inconvenience of such attachment, is entitled to recover that money from the decree-holder, irrespective of the fact whether or not such property had at the time been ordered to be sold. In the absence of any such authority, we are of opinion that, even upon general principles, a man who, to suit his own interests, decides to forego objections to the attachment of property which he asserts to belong to him, and pays the decretal amount into Court in order to get rid of the inconvenience consequent upon such attachment, cannot in reason urge that he was compelled to make such payment. It seems to us that no

1913

KANHAYA  
LAL  
v.  
NATIONAL  
BANK  
OF INDIA,  
LD.

1913  
 KANHAYA  
 LAL  
 v.  
 NATIONAL  
 BANK  
 OF INDIA,  
 LD.

compulsion arises unless and until the property is about to be sold, or in the words of their Lordships of the Privy Council above quoted, 'it is the compulsion under which it is about to be sold that makes the payment involuntary.'"

On this appeal,

*De Gruyther, K.C., G. C. O'Gorman,* and *R. M. Palat*, for the appellant, contended that he was entitled in law to the refund of the money paid by him into Court under protest on 27th August, 1902; and the Chief Court was wrong in holding that the plaint disclosed no sufficient cause of action, and that section 72 of the Contract Act (IX of 1872) was exhaustive. The Chief Court also erred in holding that the payment made under protest was voluntary, and that his only remedy was under sections 69 and 70 of that Act. Reference was made to the Contract Act, Chapter II, section 15, defining "coercion"; Chapter V, "Relations resembling those of Contract", sections 68, 69, 70 and 72 illustration (b); and it was submitted that the word "coercion" was not used in section 72 in the same sense in which it occurred in section 15 and Chapter II of the Act. Section 72 was not, and was not intended to be, exhaustive, and notwithstanding the provisions of the Contract Act a suit such as the present had been held to lie in India. Reference was made to *Jugdeo Narain Singh v. Raja Singh* (1) [LORD SHAW referred to page 665 of the report of that case, at the bottom of the page]; *Dulichand v. Ram Kishen Singh* (2); and *Narayanasami Reddi v. Osuru Reddi* (3). On the facts as stated in the plaint, therefore, the appellant had a cause of action and the appeal should be allowed.

(1) (1888) I. L. R. 15 Calc. 656, (2) (1881) I. L. R. 7 Calc. 648, 653 :  
 658, 661, 662. L. R. 8, I. A. 93, 97, 98.

(3) (1901) I. L. R. 25 Mad. 548.

*Astbury K. C.* and *Arthur Grey*, for the respondent Bank, pointed out that under the Civil Procedure Code, 1882 (of which sections 59 and 146 were cited), the appellant was bound to deposit with his plaint the principal documents upon which he relied to support his case, and that had been done by him, and it was part of the case for the respondent that if permission were given to refer to and read those documents they would show that the appellant had no valid claim, as the sale to him of the property of the Cotton Mills Company took place in contempt of an order of the Court. [LORD SHAW said their Lordships could not go into those matters on this appeal, the question, which was of the nature of a demurrer, to be decided on the facts as stated in the plaint which, for this purpose, must be treated as being true. *De Gruyther K. C.* asked to be allowed to refer to Safford and Wheeler's Privy Council Practice, page 850]. Taking then the facts in the plaint, it was contended that if the appellant thought he was injured by the attachment of the property, his remedy was provided by the Code of Civil Procedure, section 278 and following sections, which allowed him to claim the property and have the claim tried as a suit: but he did not wish to avail himself of that remedy, and it was submitted he could not therefore be said to have acted on compulsion when he chose to pay off the decree instead of contesting it. He paid the money voluntarily for his own convenience, and on the facts stated by him, and even apart from the Contract Act, he was not entitled to recover it. Reference was made to *Marriott v. Hampton* (1), and *Moore v. Vestry of Fulham* (2) per Lord Lindley. But the suit was, it was contended, governed by section 72 of the Contract Act (IX of 1872), which, it was submitted, was exhaustive and for

1913  
 KANHAYA  
 LAL  
 v.  
 NATIONAL  
 BANK  
 OF INDIA,  
 LD.

(1) (1797) 2 Smith's L. C. 11th Ed. 421. (2) [1895] 1 Q. B. 399, 403.

1913  
 KANHAYA  
 LAL  
 " .  
 NATIONAL  
 BANK  
 OF INDIA,  
 LD.

which it was necessary to prove coercion, which did not appear from the facts stated in the plaint. The "coercion" referred to in section 72 must be coercion as defined in section 15 of the Act, and the appellant had failed to prove any "coercion" as there defined, which could entitle him to recover the money paid. He was bound by the restrictions laid down in that section and was not entitled to appeal to principles of English law which were inapplicable. There was nothing unlawful in the legal process which the appellant says compelled him to pay the amount of the decree. *Freeman v. Jeffries* (1) per Martin B. was cited; and *Mohori Bibee v. Dharmodas Ghose* (2) was referred to as showing that the Contract Act was exhaustive; and *Jugdeo Narain Singh v. Raja Singh* (3), and *Dulichand v. Ram Kishen Singh* (4), which had been cited for the appellant, were distinguished on the ground that in those cases there was immediate necessity for the payment of the money, but in the present case there was none; the sale here could not have taken place at once. It was not suggested in any of the authorities that if there was not any immediate necessity—if a person could make delay before paying the money in such a case as this, there would be "coercion" sufficient to justify the certainty that an action such as this would be successful. It could only be in cases where the necessity to pay money was so urgent as to be compulsory that it could be recovered. No doubt there might be cases in which it would be inequitable that the person to whom the money was paid should retain it; but this case, it was submitted, was not one of them.

Counsel for the appellant were not heard in reply.

(1) (1869) L. R. 4 Exch. 189.

(3) (1888) I. L. R. 15 Calc. 656.

(2) (1903) I. L. R. 30 Calc. 539 :

(4) (1881) I. L. R. 7 Calc. 648 :

L. R. 30 I. A. 114.

L. R. 8. I. A. 93.

25. The judgment of their Lordships was delivered by LORD MOULTON. In order to render plain the nature of the question involved in the present appeal, it will be necessary to make a short reference to the history of the litigation between the parties. It furnishes abundant matter for regret. The suit was brought on the 28th August, 1902, and owing to the procedure adopted it will be found that at the present date the matter is but little more advanced than it was ten years ago, in spite of the fact that large sums must have been expended in the costs of the proceedings in the meantime.

The facts of the case, so far as they are relevant to the question involved in the appeal, are very simple. On the 15th August, 1902, the defendant Bank, which had obtained a decree against the Delhi Cotton Mills Co., Ltd., obtained an attachment against certain mills at Sabzi Mandi, and on the 20th August, 1902, took possession of them to obtain satisfaction for a sum of Rs. 83,005, the balance then unpaid under such decree. In his plaint the plaintiff states that he was the sole proprietor of such mills and of their contents. On thus being ousted from his property he took the course of paying under protest the sum claimed. Having thus freed his property from the attachment he at once brought the present action claiming a return of the money so paid and damages for the alleged illegal acts of the defendants.

In reply to the above plaint the respondent Bank filed certain preliminary pleas relating to the claim for the return of the money paid under protest, of which it is only necessary to cite the first, which was that "the suit as framed will not lie." It is admitted that this plea is in substance identical with the more usual form of plea, viz., that "the plaint discloses no cause of action."

1913  
KANHAYA  
LAL  
v.  
NATIONAL  
BANK  
OF INDIA,  
LD.



1913  
KANHAYA  
LAL  
v.  
NATIONAL  
BANK  
OF INDIA,  
LD.

The District Judge—no doubt with the laudable intention of shortening the proceedings and thereby lessening the costs—heard an argument on these preliminary pleas before requiring anything further to be done by the defendants, and on the 18th November, 1902, he gave judgment to the effect that so far as the recovery of the money was concerned the plaint disclosed no cause of action. He therefore dismissed with costs the claim for the recovery of the money and directed that the action should proceed on the question of damages for illegal attachment. The plaintiff, having in vain applied for the drawing up of an order embodying this decision, decided not to proceed with that part of the case which related to damages, and consequently did not appear on the further hearing, whereupon the District Judge dismissed the whole case for default, under section 102 of the Civil Procedure Code. The plaintiff appealed to the Chief Court against this decision, and that Court dismissed the appeal on the ground that no appeal lay against an order dismissing a suit under section 102. From this decision the plaintiff appealed to His Majesty in Council, and their Lordships held that the order of the 18th November, 1902, was a final decision on the case as to the recovery of the money paid, and that therefore it was not competent to the Judge to dismiss that part of the case under the powers of section 102. They therefore remitted the case to the Chief Court in order that the appeal to that Court, so far as it related to the recovery of the money paid, might be heard and decided on its merits.

The case having been thus remitted, the Chief Court rightly treated the appeal as an appeal from the order of the 18th November, 1902, dismissing the case with regard to the recovery of the money on the ground that the plaint contained no valid cause of action with

respect thereto After argument the Court decided in favour of the defendants, and dismissed the plaintiff's appeal with costs. From this decision the present appeal is brought.

The question raised by this appeal is therefore a pure point of law. Both the District Judge and the Chief Court have clearly stated that the decisions which they have given are based on the allegations in the plaint, and that for the purposes of such decisions these allegations must be taken to be true in fact. This is a necessary consequence of the nature of the plea, and the same understanding must apply to the present judgment. In asking the Court to decide an issue like the present (which is essentially a demurrer, by whatever name it may be called) the defendants must be taken to admit for the sake of argument that the allegations of the plaintiff in his plaint are true *modo et formâ*. In so doing they reserve to themselves the right to show that these allegations are wholly or partially false in the further stages of the action, should the preliminary point be overruled, but so far as the decision on the preliminary point is concerned everything contained in the plaint must be taken to be true as stated.

That being so, it is only necessary to look at the plaint to see that according to English law the contention of the defendants is unsustainable. A wrongful interference with the plaintiff's lawful enjoyment of his own property is alleged. The plaintiff was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold the defendants liable for that which they have thus caused him to do. It is true that paying under protest the sum demanded was not the only course open to him. He might have taken legal proceedings, by which sooner or later he might have

1913

KANHAYA  
LAL  
v.  
NATIONAL  
BANK  
OF INDIA,  
LD.

1913  
KANHAYA  
LAL  
v.  
NATIONAL  
BANK  
OF INDIA,  
LD.

rid himself of the interference. But to do so, would have involved his submitting to the wrong for all the period necessary for those proceedings to be effective, and that might have been a serious aggravation of the wrong. To this he was in nowise bound to submit. He was free to choose a course which did not involve any such prolongation of the trespass. Accordingly he paid under protest the sum demanded, and under English law he was unquestionably entitled to demand a repayment of that sum, because it was an involuntary payment produced by coercion, viz., the wrongful interference of the defendants with his full and free enjoyment of his own property. By English law it is not open to the wrongdoer to prescribe by which of two lawful alternatives the injured man puts a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act, or estop him from claiming that it was done under coercion.

The argument before their Lordships accordingly turned chiefly on contentions that the Indian Statute Law precluded the application in India of these well-known principles of English Common Law. These contentions were two in number. In the first place the respondents contended that in case the property of a stranger is seized under an attachment, the Code of Civil Procedure requires him to proceed under the group of sections commencing with section 278, and that this is his only remedy. Their Lordships have no doubt that the procedure referred to is merely permissive. It is analogous to the procedure by interpleader, which in England would be open in similar cases to parties owning the goods seized. But the fact that such a procedure is open to him if he chooses to adopt it interferes in no way with his right to take any other lawful alternative.

The main contention, however, was that the allegations in the plaint did not show "coercion" according to Indian Law. It was contended that nothing could be "coercion" under Indian Law unless it satisfied the definition of "coercion" which is found in section 15 of the Indian Contract Act and that the allegations in the plaint failed so to do because they did not show that the "unlawful detaining or threatening to detain" the property was "with the intention of causing any person to enter into an agreement." Their Lordships are of opinion that this argument is not sound and that it is based on a fundamental misunderstanding of the object and effect of section 15 of the Indian Contract Act.

Section 15 forms part of a chapter which specially deals with the requisites of a valid contract. This chapter commences with section 10, which may be regarded as the fundamental section, and which reads as follows :—

"All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void."

The sections immediately following proceed to define the terms used in this fundamental section. Sections 11 and 12 are devoted to the interpretation of the phrase "competent to contract." Section 13 deals with the term "consent." Sections 14 to 18 deal with the phrase "free consent." In so doing section 14 commences by defining when consent is said to be "free" and lays down that it is so when it is not caused by "coercion" as defined by section 15, "or undue influence, fraud," etc. It will therefore be seen that section 14 relates to "free consent" as an element in the making of contracts. It is natural, therefore, that when "coercion" comes to be defined in section

1913  
KANHAYA  
LAL  
S.  
NATIONAL  
BANK  
OF INDIA,  
LD.

1913  
 KANHAYA  
 LAL  
 v.  
 NATIONAL  
 BANK  
 OF INDIA,  
 LD.

15 for the purposes of section 14 it is defined as follows :—

“Coercion is the committing or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement.”

It is clear, therefore, that this definition of “coercion” is solely a definition which applies to the consideration whether there has been “free consent” to an agreement so as to render it a contract under section 10. This explains why in the definition of “coercion” it is limited to an unlawful act done “with the intention of causing the person to enter into an agreement.” But it would be to make nonsense of the statute if it were to be taken to mean that “coercion” in a legal sense could only exist if the object was to bring about a contract. Indeed such an interpretation would render the Act inconsistent with itself. Section 72, which is in Chapter 5, which deals with “certain relations resembling those created by contract”, reads as follows :—

“A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it.”

and Illustration B to that section reads as follows :—

“A railway company refuses to deliver up certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.”

It is impossible to contend that the coercion referred to in this section or in the above Illustration is “with the intention of causing any person to enter into an agreement.” The word “coercion” must therefore be there used in its general and ordinary sense as an English word, and its meaning is not controlled by the definition in section 15. That definition is expressly inserted for the special object of applying to section 14 *i.e.*, to define what is the criterion whether an

agreement was made by means of a consent extorted by "coercion" and does not control the interpretation of "coercion" when the word is used in other surroundings.

A further contention appears to have been put forward in the Court below to the effect that the plaintiff's only remedy was to proceed against the Delhi Cotton Mills Co., Ltd., under sections 69 and 70, in order to recover from them the money paid, seeing that they would have had the benefit of the payments in the satisfaction of the decree obtained against them. It is not a matter of surprise that this contention was not pressed before their Lordships. It is obviously unsustainable. Those clauses do not refer in any way to remedies against the wrongdoer and are therefore wholly irrelevant to the question in this appeal.

Their Lordships have thought it proper to deal specifically with the arguments raised on the hearing on account of the importance of the questions raised. But they are also of opinion that the matter is covered by authority. In the case of *Dulichand v. Ram Kishen Singh* (1) the circumstances were very similar to those in the present case, and on appeal to this Board their Lordships decided that money paid by the true owner to prevent the sale of his property under an execution could be recovered back.

In their judgment their Lordships say:—

"The objections taken to the action were that the payment was voluntary. It was made to prevent the sale which would otherwise inevitably have taken place of the *mouzah* which the respondents had purchased and was made therefore under compulsion of law; that is under force of these execution proceedings. In this country, if the goods of a third person are seized by the sheriff and are about to be sold as the goods of the defendant, and the true owner pays money to protect his goods and prevent the sale, he may bring an action to recover back the money he has

1913  
KANHAYA  
LAL  
v.  
NATIONAL  
BANK  
OF INDIA,  
LD.

1913  
 KANHAYA  
 LAL  
 v.  
 NATIONAL  
 BANK  
 OF INDIA,  
 LD

so paid; it is the compulsion under which they are about to be sold that makes the payment involuntary."

The respondents sought to distinguish the present case from the case just cited by contending that the sale in the present case was not inevitable. But it is evident that the greater or less probability of a sale taking place does not affect the *ratio decidendi* of their Lordships in that case, which is that the payment was made under the force of the execution proceedings, and that in India, as in England, such a payment is regarded by the law as being made under compulsion.

In their Lordships' opinion, therefore, the Chief Court ought to have given judgment in favour of the plaintiff in his appeal against the order of the 18th November, 1902. The consequence of such a decision would have been that the case would have gone back to the District Judge to be tried on the facts.

As has already been stated, the decision of this Board does not affect or prejudice any contention of either party with regard to the facts, or any other contention of law not covered by the present judgment.

Their Lordships will therefore humbly advise His Majesty to allow the appeal and to remit the case to the Chief Court in order that the case may be sent to the District Judge to hear and determine. The respondents must pay all the costs of the second hearing before the Chief Court and the costs of this appeal.

*Appeal allowed.*

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *Sanderson, Adkin, Lee & Eddis.*

J. V. W.

**APPELLATE CIVIL.**

*Before Harington and Carnduff JJ.*

HARIHAR PRASAD SINGH

*v.*

SHYAM LAL SINGH.\*

1913

*Feb. 25.*

*Court-fee—Declaratory decree, suit for—Consequential relief—Plaint, rejection of—Civil Procedure Code (Act V of 1908), O. VII, r. 11—Valuation of suit—Court-fees Act (VII of 1870), s. 7, paras. iv, cl. (c), v, cl. (a)—Valuation for purpose of jurisdiction—Suits Valuation Act (VII of 1887), s. 8.*

In a suit for declaration that a decree amounting to Rs. 2,794 and odd should be declared forged, illusory and unfit for execution, and also for a declaration that the family property valued at Rs. 7,000 was not liable to be sold in execution of that decree, the plaintiff paid court-fee ten times the Government revenue payable on the land worth Rs. 7,000. The Court below rejected the plaint :—

*Held*, that the real value of the reliefs claimed was Rs. 2,794 and odd, the value of the decree, and that the plaintiff not having paid court-fee on that amount, the plaint was rightly rejected.

A plaintiff cannot value his case for the purpose of court-fee and for the purpose of jurisdiction at different amounts.

**APPEAL** by Harihar Prasad Singh, the plaintiff.

This appeal arose out of an action brought by the plaintiff, who was a minor, for a declaration that a certain decree was forged, fraudulent and was not fit for execution, and also for a declaration that the joint family property was not liable for the payment of the said decree. The plaintiff alleged that the father of defendants Nos. 2 and 3 got a bond executed by defendant No. 8, the father of the plaintiff, and caused a false necessity to be recited in the said

\* Appeal from Original Decree, No. 222 of 1909, against the decree of Tarak Nath Dutt, Subordinate Judge of Patna, dated May 8, 1909.



1913

HARIHAR  
PRASAD  
SINGH  
v.  
SHYAM LAL  
SINGH.

bond; that on the basis of the said bond defendants Nos. 2 and 3 instituted a suit, and in collusion with defendant No. 8 obtained a compromise decree; that in the said suit no notice was served upon the plaintiff and no proper proceeding was taken for the appointment of his guardian; that the plaintiff's mother, who is his guardian, having come to know that the family properties of the plaintiff were to be sold in execution of the said decree, brought the present suit. In it the plaintiff further prayed that if the whole of the property could not be released, the plaintiff's share might be released. The amount of the decree under execution was Rs. 2,794-14-3, and the value of the family property was stated to be Rs. 7,000. The plaintiff paid court-fee ten times the Government revenue payable on the land worth Rs. 7,000.

The defendants pleaded, *inter alia*, that the court-fee paid by the plaintiff was insufficient, and as such it ought to be rejected. The Court below held that inasmuch as the property was valued at Rs. 7,000, *ad valorem* court-fee on that amount should have been paid, and directed the plaintiff to pay the balance within ten days. The plaintiff having failed to do so, the plaint was rejected. Against this decision the plaintiff appealed to the High Court.

*Babu Sarat Chandra Roy Chowdhury*, for the appellant. The court-fee paid by the plaintiff was the proper court-fee. He said that the value of the property which would be affected was Rs. 7,000, and it was a revenue-paying estate, therefore he paid court-fee ten times the Government revenue: see section 7, para. v, cl. (b) of the Court-fees Act. A Court cannot increase the valuation of a suit. It is the plaintiff who can do so. Where a plaintiff has valued his suit

arbitrarily, and upon no principle at all, there the Court can interfere: see *Umatul Batul v. Nauji Koer* (1). In the present case the plaintiff did not value the suit arbitrarily.

*Babu Karinamoy Bose*, for the respondent. Under section 8 of the Suits Valuation Act the plaintiff must pay court-fee according to the valuation he put in the plaint for the purpose of jurisdiction. In this suit, for the purpose of jurisdiction he valued at Rs. 7,000, so he was bound to pay *ad valorem* court-fee on that amount: see *Rajkrishna Dey v. Bepin Behary Dey* (2).

*Babu Sarat Chandra Roy Chowdhury*, in reply.

HARINGTON J. This is an appeal against the judgment of the Subordinate Judge of Patna rejecting the plaint on the ground that insufficient court-fee was paid. And the question which comes up now is whether the Judge was right in taking that course. The suit was one which asked that a decree amounting to Rs. 2,794-14-3 should be declared forged, fraudulent, illusory, collusive, inoperative and unfit for execution. It also asks that the family property valued at Rs. 7,000 should be declared to be not liable to be sold in execution of this decree. There was also an alternative prayer, if the whole of the property could not be released, the plaintiff's share might be released. The plaintiff tendered ten times the Government revenue payable on the land worth Rs. 7,000, basing his claim to do that on the provisions of section 7, sub-section v of the Court-fees Act. But that sub-section provides for cases where a suit is brought for possession of land. The present suit is not one brought for possession of land. This is a case where a declaration as also consequential reliefs have been asked for. It

1913  
HARIHAR  
PRASAD  
SINGH  
v.  
SHYAM LAL  
SINGH.

(1) (1907) 6 C. L. J. 427, 436.

(2) (1912) 16 C. L. J. 194.

1913

HARIHAR  
PRASAD  
SINGH

v.

SHYAM LAL  
SINGH.HARINGTON  
J.

comes under the previous sub-section by which an *ad valorem* fee is payable.

It has been contended that the Court could not question the value put on the reliefs claimed. I think that this cannot be argued where it is shown on the face of the plaint that the value put on the relief is too small. It is the duty of the Court to see that proper value is put on the reliefs claimed.

In this case, in my opinion, the real value of the reliefs claimed is Rs. 2,794 odd, which is the amount of the decree the plaintiff asked to have declared fraudulent. This was the decree made against him; from this he desired to escape liability. I do not think that Rs. 7,000, the value of the whole property, could be the value of the reliefs claimed; for even if the entire property were sold, the balance of the sale-proceeds after satisfying the decretal amount would be payable to the owners of the property. I think, therefore, that the proper value of the reliefs claimed is the value of the decree.

What has happened in this case is that for the purpose of jurisdiction the plaintiff valued his case at Rs. 7,000. Under the Suits Valuation Act, section 8 court-fee would be payable on that value. He cannot value his case for the purpose of court-fee and for the purpose of jurisdiction at different amounts. The correct value of the suit is the value of the amount of the decree. If that value is put on for the purpose of court-fee, it must also be put on for the purpose of jurisdiction.

The result is that this appeal is dismissed with costs.

CARNDUFF J. I agree.

S. C. G.

*Appeal dismissed.*

**CIVIL RULE.***Before Stephen and D. Chatterjee JJ.*

HARAI SAHA

v.

FAIZLUR RAHMAN\*

1913

March 5.

*Rateable Distribution—Deposit by Judgment-debtor—Civil Procedure Code (Act V of 1908) O. XXI, r. 89, and s. 73—Alteration in s. 73, effect of.*

When money is paid into Court under O. XXI, r. 89 of the Civil Procedure Code, 1908, there can be no rateable distribution under s. 73 of the Code.

The scope of s. 73 of the new Code of Civil Procedure (Act V of 1908) is far wider than that of s. 295 of the old Code (Act XIV of 1882), yet the effect of the enactment in s. 310A of the old Code, which is reproduced in O. XXI, r. 89 of the new Code, remains unaltered.

RULE granted to the petitioners, Harai Saha and another, the decree-holders.

One Harai Saha and another obtained money decree against certain persons. In execution of that decree immoveable properties of the judgment-debtors were sold. Opposite parties Nos. 6 and 7, who obtained decrees in other suits against the said judgment-debtors, applied under s. 73 of the Code of Civil Procedure, 1908, for rateable distribution of the sale-proceeds. The judgment-debtors then made a deposit under O. XXI, r. 89, and got the sale set aside, after which the opposite parties Nos. 8 and 9 applied for rateable distribution, which was made by an order of the learned Munsif of Comilla, among the petitioners and

\* Civil Rule, No. 6727 of 1912, against the order of Jogendra Chandra Dey, Munsif of Comilla, dated Dec. 23, 1912.

1913  
 HARAI SAHA  
 v.  
 FAIZLUR  
 RAHMAN.

all the other decree-holders. Against this order the petitioners moved the High Court and obtained this Rule.

*Babu Harendra Narayan Mitter* (with him *Babu Upendra Kumar Roy*), for the petitioners. Question is whether money deposited under section 310A of the old Code of Civil Procedure is assets within the meaning of section 295 of the Code. I submit it is not. Further, the order "for payment to the decree-holder" in section 310A means that the decree-holder, in execution of whose decree the money was realized, is the person solely entitled to the money paid into Court: see *Roshun Lall v. Ram Lall Mullick* (1). That being so, the learned Munsif acted without jurisdiction in directing the rateable distribution in the way he did.

*Babu Jogesh Chandra Roy* (with him *Babu Jatindra Mohan Ghose*), for the opposite party. The words in section 295 of the old Code are "assets are realized by sale or otherwise, etc.," and the words in section 93 of the new Code are "where assets are held by a Court." The effect of the change in the section is that money realized in execution and money deposited under section 310A are assets held by the Court. That being so, all the decree-holders would be entitled to rateable distribution.

*Babu Harendra Narayan Mitter*, in reply. Under section 310A of the old Code the money is deposited for payment to the decree-holder: *Bihari Lal Paul v. Gopal Lal Seal* (2). Therefore, the petitioners are only entitled to get the money deposited. The amount so deposited would be assets realized in the course of execution: *Pita v. Chuni Lal Harakchand* (3). Although the word "assets" might include money

(1) (1903) I. L. R. 30 Cal. 262.

(2) (1897) 1 C. W. N. 695.

(3) (1906) I. L. R. 31 Bom. 207.

deposited in Court as in the present case, but reading O. XXI, r. 89, it is clear that the said money can not be taken by any other decree-holder. The change made in section 73 was never intended to override any specific provision of law.

1913  
HARAI SAHA  
v.  
FAIZLUR  
RAHMAN.

*Cur. adv. vult.*

STEPHEN AND CHATTERJEE JJ. The petitioners before us obtained a money decree against certain persons, and executed it by a sale of immoveable property belonging to them. Two decree-holders in other suits, opposite parties Nos. 6 and 7, then applied under section 73 of the Code for rateable distribution of the money realized by the sale in the petitioner's suit; the judgment-debtor proceeded to deposit in Court under O. XXI, r. 89, money representing the decretal amount, and got the sale set aside, after which opposite parties Nos. 8 and 9 applied for rateable distribution, which was made among the petitioners and all the other decree-holders. A Rule has been granted calling on the decree-holders other than the petitioners to show cause why the order made under section 73 should not be set aside on the ground that the Court had no power to order rateable distribution.

Under the old Code it was held by this Court in *Roshun Lall v. Ram Lall Mullick* (1) that when money was paid into Court under section 310A, there could be no rateable distribution under section 295, for the terms of the former section were too precise to admit of the application of the latter. This followed the decisions in *Hari Sundari Dasya v. Shashi Bala Dasya* (2) and *Bihari Lal Paul v. Gopal Lal Seal* (3) where, as in this case, application for rateable distribution

(1) (1903) I. L. R. 30 Calc. 262. (2) (1896) 1 C. W. N. 195.

(3) (1897) 1 C. W. N. 695.

1913  
HARAI SAHA  
v.  
FAIZLUR  
RAHMAN.

was made before the payment into Court under section 310A, now represented by O. XXI, r. 89. This case is therefore covered by authority, unless the alterations effected in the enactments in question have changed the law. Section 310A of the old Code is practically reproduced in O. XXI, r. 89; but section 295 is replaced by section 73. The result of this is that whereas the subject-matter of rateable distribution used to be "assets realised by sale or otherwise in execution of a decree," it is now "assets held by the Court." It is obvious that the scope of the new section is thus far wider than that of the old one; but this does not alter the effect of the enactment in section 310A which is reproduced in O. XXI, r. 89.

The result is that this Rule must be made absolute and the order set aside. The petitioner is entitled to his costs.

S. C. G.

*Rule absolute.*

**APPELLATE CIVIL.***Before Mookerjee and Beachcroft JJ.*

MADANMOHAN NATH SAHI DEO

v.

PROTAP UDAI NATH SAHI DEO.\*

1912

June 21.

*Execution of Decree—Rent decree—Sale—Encumbrances by way of maintenance grant—Portion of tenure in charge of the Encumbered Estates Act authorities exempted from sale by Commissioner—Effect of the order of exemption—Chota Nagpur Landlord and Tenant Procedure Act (Beng. I of 1879), s. 123—Chota Nagpur Tenancy Act (Beng. VI of 1908), s. 208—General Clauses Act (Beng. I of 1899), s. 8, cl. (e)—Rent Recovery Act (Beng. VIII of 1865), ss. 4, 5 and 16.*

When an application in execution of a rent decree was made for the sale of all the villages comprised in a tenure, but the Commissioner, for reasons sufficient in his opinion, directed the exemption of some of the villages from the sale :—

*Held*, that the decree-holder was not deprived of his right to execute his decree, which must be executed as a decree for rent against the unexempted portion of the tenure under the Bengal Rent Recovery Act of 1865. The effect of a sale of the unexempted portion would be to pass the property to the purchaser free of all encumbrances.

*Dwarkanath Chuckerbutty v. Dhun Monee Chowdhraïn* (1), *Sham Chand Mitter v. Jugut Chundra Sircar* (2) referred to.

APPEAL by the defendant, Thakur Madanmohan Nath Sahi Deo.

This was an appeal arising out of an application for execution. Thakur Madanmohan Nath Sahi Deo was the holder of a certain tenure in respect of which one Protap Udai Nath Sahi Deo brought a suit for arrears

\* Appeal from Original Order No. 228 of 1912, against the decision of Charu Chandra Mookerjee, Deputy Collector, Ranchi, dated May 8, 1912.

(1) (1871) 15 W. R. 524.

(2) (1874) 22 W. R. 541.



1912

MAIDANMOHAN  
NATH  
SAHI DEO  
v.  
PROTAP  
UPAI NATH  
SAHI DEO.

of rent, and obtained a decree on the 19th April, 1905. On the 28th November, 1910, the plaintiff applied for execution of his decree. The defendant had, prior to this application, created on a part of his tenure encumbrances by way of maintenance grants in favour of his dependents in respect of some of the villages comprised in his tenure and at the time of the application for execution the properties of these maintenance holders were under the charge of the Encumbered Estates Act authorities. On an application made by the authorities for exemption of the said properties under s. 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879, the Deputy Commissioner recommended the order of exemption and on the 30th March, 1911, the order was accordingly made. On the 18th April, 1912, the defendant filed his objection under s. 47 of the Code of Civil Procedure, 1908, against the order of execution, and on the 8th May, 1912, his petition was dismissed and the sale was ordered to be proceeded with. Thereupon, the defendant appealed to the High Court.

*Babu Bepin Chandra Mallick*, for the appellant. My first contention is that a portion of the tenure cannot be sold in execution of a rent decree against the entire tenure. Under the provisions of sections 4 and 16 of the Rent Recovery Act, sales under that Act should be with respect to entire tenures. In this suit a portion of the tenure was ordered by the Commissioner to be exempted, and consequently the decree-holder cannot execute his decree as a decree for rent under that Act. It is only in the case where the decree-holder seeks to execute a decree for rent of a fraction of a tenure that an order for exemption can be made in respect of a part of the tenure: see *Dwarkanath Chuckerbutty v. Dhun Monee Chowdhraïn* (1).

My next contention is that, the decree-holder having obtained an order for sale of the unexempted portion of the tenure, he cannot apportion the rent in respect thereof without the consent of all persons interested. An apportionment without such consent would cause irreparable damage and material loss to the appellant. The plaintiff has no right in apportioning the rent. Even if there be any power to separate the tenures—which power, I contend, no one has—the apportioning must be in our presence.

Lastly, I contend that a fresh proclamation ought to be issued, as a portion of the properties specified in the sale proclamation has been excluded from the sale : see section 5 of the Rent Recovery Act.

*Babu Jogesh Chandra Dey*, for the respondent. As regards the first contention, my submission is that the exemption of a part of a tenure enables the respondent to treat the remainder as a whole, and under the Chota Nagpur Landlord and Tenant Procedure Act (Beng. I of 1879) the whole tenure must pass. Under the provisions of the General Clauses Act (Beng. I of 1899), s. 8, this Act and not the Chota Nagpur Tenancy Act (Beng. VI of 1908) applies. I rely on the provisions of s. 123 of Act I of 1879, read with the provisions of the Rent Recovery Act (Beng. VIII of 1865) and also on the Full Bench case of *Sham Chand Mitter v. Juggut Chundra Sircar* (1).

As regards the second contention, no apportionment has, as a matter of fact, yet been made. The respondent took out execution of the whole property and all the persons interested were present all along.

*Babu Bepin Chandra Mallick*, in reply. The case of *Sham Chand Mitter v. Juggut Chundra Sircar* (1) supports my contention.

1912

MADANMOHAN  
NATH  
SAHI DEO  
v.  
PROTAP  
UDAI NATH  
SAHI DEO.

1912

MADANMOHAN  
NATH  
SAHI DEO  
v.  
PROTAP  
UBAI NATH  
SAHI DEO.

MOOKERJEE AND BEACHCROFT, JJ. This appeal raises a question of first impression as to the construction of section 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. It appears that the respondent obtained a decree for rent against the appellant in respect of a tenure on the 19th April, 1905. On the 28th November, 1910, the application for execution, now under consideration, was presented. The judgment-debtor, tenure-holder, had created, on a part of his tenure, encumbrances by way of maintenance grants in favour of his dependants. The properties of these maintenance holders were at the time under the charge of the Encumbered Estates Act authorities. They applied for exemption of the villages comprised in the maintenance grants under section 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. Upon the recommendation of the Deputy Commissioner, the order of exemption was made by the Commissioner on the 30th March, 1911. The question in controversy now is, what is the precise effect of this order of exemption.

Before we determine this question, it is necessary to consider in the first instance by what statutory provisions the matter before us is governed. The Commissioner made his order for exemption ostensibly under section 208 of the Chota Nagpur Tenancy Act, 1908. In our opinion, the order in question could not have been made under that section; but this does not affect the validity of the order, inasmuch as it could have been made under section 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. Sub-section (1) of section 208 of the Chota Nagpur Tenancy Act, 1908, shows that the provisions contained therein apply to cases of execution of decrees passed by the Deputy Commissioner under that Act. The decree now under execution was

passed prior to the commencement of the Chota Nagpur Tenancy Act, 1908. Consequently, under section 8, clause (e) of the Bengal General Clauses Act, 1899, the provision applicable is that contained in section 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879, and the effect of that section we now proceed to consider.

Section 123 provides that if the decree of which execution is sought is for arrears of rent in respect of a tenure, the decree-holder may make application for the sale of such tenure, and the tenure may, thereupon, be brought to sale in execution of the decree according to the provisions for the sale of under tenures contained in the Bengal Rent Recovery Act, 1865; and all the provisions of that Act shall, as far as may be, apply. This is followed by a proviso to the effect that the Commissioner may by order, in any case in which he may consider it desirable so to do, prohibit the sale of any tenure or portion thereof.

On behalf of the judgment debtor it has been contended that the effect of an order of exemption of a portion of a tenure by the Commissioner is to make it impossible for the decree-holder to execute the decree as a decree for rent under the Bengal Rent Recovery Act, 1865. It is plain that the effect of an order of exemption of a part of the tenure is not to deprive the decree-holder entirely of his right to execute the decree; for, if that had been the consequence, the effect would have been the same as if the entire tenure had been exempted from sale. We take it, therefore, that, notwithstanding the order for partial exemption, it is open to the decree-holder to execute his decree. The real question in controversy is, whether, on an order for partial exemption, the decree is to be executed as a decree for money or as a decree for rent. On behalf of the appellant, it has

1912

MADANMOHAN  
NATH  
SAHI DEO  
v.  
PROTAP  
UPAI NATH  
SAHI DEO.

1912  
 MADANMOHAN  
 NATH  
 SAHI DEO  
 v.  
 PRATAP  
 UDAI NATH  
 SAHI DEO.

been argued that the order for exemption can be made in respect of a part of the tenure, only where the decree-holder seeks to execute a decree for rent of a fraction of a tenure, and in support of this view reference has been made to the case of *Dwarkanath Chuckerbutty v. Dhun Monee Chowdhraïn* (1). That case, in our opinion, has no application; it merely shows that when a share of a tenure has been treated as an independent and self-contained tenancy, in an execution of a decree for rent due in respect thereof, the property may be sold as if it were an entire tenure. But it is plain that the provisions of section 123 cannot be restricted in the manner suggested, because, if that was the only case where an order for partial exemption could be made, that would really be a case for application for sale of what constituted an entire tenure; and the prohibition would in substance be of the sale of such a tenure. Section 123 plainly covers a case of the description now before us, when an application is made for the sale of all the villages comprised in a tenure, but the Commissioner, for reasons sufficient in his opinion, directs the exemption of some of the villages from the sale. In such a case, it is plain that the sale of the unexempted portion is still to take place under the Bengal Rent Recovery Act of 1865; in other words, the restrictions in the proviso do not affect the provisions in the substantive part of the section for the sale of the property. Reliance, however, has been placed upon sections 4 and 16 of the Bengal Rent Recovery Act, 1865, to show that the legislature contemplated that sales under that Act should be sales of entire tenures; it may also be conceded as laid down by the Full Bench in *Sham Chand Mitter v. Juggut Chundra Sircar* (2) that ordinarily when a sale takes place of an entire tenure

(1) (1871) 15 W. R. 514.

(2) (1874) 22 W. R. 541.

under the Bengal Rent Recovery Act, 1865, the purchaser acquires the property free of all encumbrances. But there is, in our opinion, no inconsistency between the proviso to section 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879, and the provisions of the Bengal Rent Recovery Act, 1865. It was competent to the legislature to lay down that a sale under section 123 would be a sale under the Bengal Rent Recovery Act of 1865, notwithstanding the fact that what was sold was not the entire tenure, but only the unexempted portion thereof. This, we think, is the result of the legislative provisions on the subject. If the contrary view were maintained, the result would be that by an order of exemption the landlord decreeholder would be practically deprived of his security for the rent. If the sale of the unexempted portion was merely the sale of the right, title, and interest of the judgment-debtor, the property might not be saleable at all, and a purchaser might not be found willing to bid a sufficient sum for the satisfaction of the judgment debt. The legislature could not have intended that, because, as in the case before us, an order of exemption is made for the benefit of persons whose title has been created by the defendant under circumstances which could not be controlled by the landlord, the landlord practically loses his security for the arrears of rent due to him. We hold, accordingly, that the effect of a sale of the unexempted portion is to pass the property to the purchaser free of all incumbrances. When the purchaser has obtained the property, what his precise position will be, that is, whether he will be, jointly with the holder of the exempted portion of the property, liable for the whole rent, is a matter which does not require consideration at this stage. It is conceivable that the purchaser may, with good reason, contend that, as the landlord, though under

1912

MADANMOHAN  
NATH  
SAHI DEO  
v.  
PROTAP  
UDAI NATH  
SAHI DEO.

1912

MADANMOHAN  
NATH  
SAHI DEO  
v.  
PROTAP  
UDAI NATH  
SAHI DEO.

compulsion, has brought to sale some only of the villages included in the tenure, he is bound to apportion the rent; the consequence of such a sale, if the view suggested is well-founded, may be that the tenure is ultimately split up into two distinct tenures. These, however, are matters which must be left open for consideration, if and when the contingency arises. It is sufficient for us to hold now that the entire decree may be executed as a decree for rent against the unexempted portion of the tenure, and that the auction purchaser will acquire the status of a purchaser under section 16 of the Bengal Rent Recovery Act, 1865. The view put forward by the judgment debtor appellant, therefore, can not be accepted.

A minor question has been raised in the appeal, and requires only a brief consideration. It has been suggested that the sale proclamation was not properly drawn up, and that it was not competent to the decree-holder to set out in the sale proclamation the amount of rent that might be legitimately levied from the villages sought to be sold, and the villages exempted, respectively. Reference has been made in this connection to section 5 of the Bengal Rent Recovery Act, 1865. That section provides that the notice of sale "shall specify, in the words used in the plaint in the suit in which the decree was made, the name of the village, estate and pergunnah or other local division, in which the land comprised in the said under-tenure is situated, the yearly rent payable under the said under-tenure, and the gross amount recoverable under the said decree." It is clear that in the case before us the decree-holder was not bound to apportion the rent that might be leviable from the exempted and unexempted villages, respectively. He would have strictly complied with the provisions of section 5, if, in the words of the section, he had stated the yearly

rent payable in respect of the entire tenure, together with a note that the villages named were exempted from sale under the order of the Commissioner. The judgment-debtor, therefore, cannot reasonably complain of what has been done by the decree-holder. At any rate, as a new sale proclamation is to be issued, we direct that it be drawn up in strict conformity with section 5 of the Bengal Rent Recovery Act, 1865. The rent will not be apportioned; the rent payable annually in respect of the whole tenure will be stated, together with a note that certain specified villages were exempted from sale.

The result is that this appeal fails, and is dismissed with costs.

O. M.

*Appeal dismissed.*

## CRIMINAL REVISION.

*Before Core and N. R. Chatterjee JJ.*

AZIZ SHEIKH

v.

EMPEROR.\*

1913

March 11.

*Appeal—Concurrent sentences of imprisonment not individually appealable—Aggregate of sentences—Right of appeal—Criminal Procedure Code (Act V of 1898), ss. 35 (3) and 413.*

An accused sentenced to concurrent terms of imprisonment, not one of which is individually appealable, has no right of appeal. Concurrent sentences cannot, for the purposes of appeal, be taken collectively.

*Suknandan Singh v. King-Emperor* (1) approved.

*Abdul Khalek v. King-Emperor* (2) not followed.

\* Criminal Revision, No. 11 of 1913, against the order passed by B. C. Mitter, Sessions Judge of Birbhum, dated Dec. 4, 1912.

(1) (1912) 17 C. L. J. 392.

(2) (1912) 17 C. W. N. 72.

1912  
MADANMOHAN  
NATH  
SAHI DEO  
v.  
PROTAP  
ULAI NATH  
SAHI DEO.



1913  
—  
AZIZ SHERKH  
v.  
EMPEROR.

The mere admission of an appeal does not preclude the Court from subsequently determining the question whether or not an appeal lies in the case.

THE petitioners were placed on trial before the Sub-divisional Officer of Rampurhat, a Magistrate of the first class, on charges of rioting, hurt and house trespass. Four of them were convicted, on the 23rd September, 1912, under sections 147, 323 and 448 of the Penal Code, and one under sections 147, 311 and 448, but all were sentenced to one month's rigorous imprisonment under each section concurrently, and further bound down to keep the peace. They thereupon preferred an appeal to the Sessions Judge of Birbhum, who admitted the same, sent for the records and released them on bail. The appeal came on for hearing before the Additional Sessions Judge, and he, by his order dated the 11th November, 1912, held that no appeal lay, but left the final determination of the question to the Sessions Judge. The latter, considering the judgment of the Additional Sessions Judge to be final, refused to hear the appeal. The petitioners thereupon moved the High Court and obtained the present Rule.

*Babu Surendra Nath Ghosal*, for the petitioners. The accused were convicted under three sections, and sentenced under each to one month's rigorous imprisonment. The aggregate sentence is, therefore, one of three months. Refers to section 35 (3) of the Criminal Procedure Code and *Abdul Khalek v. King-Emperor* (1). At any rate the appeal was admitted by the Sessions Judge, and it was incumbent on the Additional Judge to hear it on the merits.

No one appeared to shew cause.

COXE AND N. R. CHATTERJEA JJ. In this case the petitioners were sentenced to rigorous imprisonment for one month under section 323 (or, in the case of Muhir Sheik, under section 323 read with section 114), to rigorous imprisonment for one month under section 448, and to rigorous imprisonment for one month under section 147. All these sentences were concurrent. They appealed, and the Sessions Judge passed the following order: "Admit. Send for the records. Issue notices. Bail allowed Rs. 100 each. Fix 5th October." Then, during the vacation, the Vacation Judge heard the appeal and expressed himself as follows: "It appears to me, therefore, that no appeal lies. As, however, the appeal was admitted by the Sessions Judge, I do not pass final orders. I do not know whether the appeal was admitted on a different view of the law, or by reason of the fact of the sentences being concurrent not being brought to the notice of the Judge. I, therefore, leave the case to be disposed of by him." On his return the Sessions Judge passed the following order: "The judgment of the Additional Sessions Judge, so far as I am concerned, must be taken as final, in spite of his saying that it is left to me."

1913  
 AZIZ SHEIKH  
 v.  
 EMPEROR.

It is argued that as the appeal was once admitted, it could not subsequently be held that no appeal lay. We cannot accept this contention. Even if there were any provision in the Criminal Procedure Code for admitting appeals, the mere fact of admission would not preclude the Court from dealing subsequently with the question whether an appeal lay.

The only question that really arises for determination is whether an accused, who has been sentenced to concurrent terms of imprisonment, not one of which is individually appealable, has a right of appeal against them collectively. It was held in *Abdul*

1913  
AZIZ SHEIKH  
v.  
EMPEROR.

*Khalek v. King-Emperor* (1) that he has. We are unable to accept this view. The learned Judges observe that under the rulings of this Court concurrent sentences, for the purpose of appeal, must be taken in the aggregate. We cannot trace these rulings, and in our opinion the aggregate of three concurrent equal sentences is the same thing as each of the sentences. In other words, if a man is sentenced three times over to be imprisoned for the month of March, 1913, the aggregate of his sentences is one month. From sub-section (2) of the section it would seem that it is only in the case of consecutive sentences that the question of aggregate punishment can be said to arise. We are not, therefore, prepared to follow the decision in *Abdul Khalek v. King-Emperor* (1), but we do not think that the matter need be referred to a Full Bench, as one of the learned Judges who decided it seems to have changed his opinion: vide *Suknandan Singh v. King-Emperor* (2).

We think, therefore, that no appeal lay to the Sessions Judge, and the Rule accordingly fails and is discharged.

E. H. M.

*Rule discharged.*

(1) (1912) 17 C. W. N. 72.

(2) (1912) 17 C. L. J. 392.

## PRIVY COUNCIL.

KRISHNA PERSHAD SINGH

v.

MOTI CHAND.

P.C.<sup>2</sup>  
1913Feb. 12, 13 ;  
March 6.

## [ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

*Appeal to Privy Council—Orders under ss. 311, 312 of the Civil Procedure Code, 1882, confirming or setting aside sales—Civil Procedure Code, 1882, ss. 588 (16), 594, 595, 596—Orders declared final by s. 588—Setting aside sale in execution of decree—Non-representation of minor—Irregularities in proclamation of sale—Civil Procedure Code, 1882, s. 287—Under-estimation of value of property—Rights of mother of minor as his natural guardian.*

An appeal lies to His Majesty in Council from an order under sections 311 and 312 setting aside or confirming a sale, notwithstanding the provisions as to such orders being final contained in section 588 (16) of the Code.

The definition of "decree" in section 2 of the Code is not applicable to Chapter XLV (relating to appeals to His Majesty in Council). For the purposes of that Chapter a definition of "decree" has been therein adopted, which is special, and differs from the meaning it bears elsewhere in the Code. The word decree in that Chapter must be read as being equivalent to "decree, judgment or order." So read final orders may be appealed against to His Majesty in Council under section 595, and that provision cannot be restricted by the provisions of section 588 (16) that such orders passed in appeal "shall be final."

In this case, which was an appeal from an order of the High Court confirming a sale in execution of decree, and reversing an order of a Deputy Commissioner which set the sale aside, it appeared that the judgment-debtor had died pending the proceedings for attachment and sale, leaving a widow and a minor son, and that the whole of the proceedings subsequent to his death were without notice to any one representing the minor ; that the sale proclamation had not been properly made, and did

1913  
 —  
 KRISHNA  
 PERSHAD  
 SINGH  
 v.  
 MOTI  
 CHAND.

not contain the particulars required by section 287 of the Code of Civil Procedure, 1882, especially those as to the value of the property which was grossly under-estimated ; that the property was sold for a very inadequate price ; and that there was abundant evidence that the appellant had suffered substantial injury therefrom :—

*Held* (reversing the decision of the High Court), that there had been no proper representation of the minor, and that the above matters constituted material irregularities in publishing and conducting the sale within the meaning of section 311 of the Code, which justified the setting aside of the sale.

There were concurrent decisions of the Courts in India that the Court of Wards never took charge of the property of the minor, and their Lordships came to the same conclusion.

*Held*, that inasmuch as the interests of the minor with regard to the property were not in fact represented by the Court of Wards, it was open to his mother as his natural guardian to appear (as she had done) and represent him in the proceedings, and his appeal was not rendered incompetent thereby.

APPEAL from an order (18th May, 1908) of the High Court at Calcutta, which reversed an order (16th February, 1906) of the Deputy Commissioner of Hazaribagh.

The judgment-debtor was the appellant to His Majesty in Council.

The facts of the case are sufficiently stated in the judgment of their Lordships of the Judicial Committee.

The order of the Deputy Commissioner was one setting aside a sale, because the proclamation was not accompanied by beat of drum.

On appeal, the High Court (RAMPINI and SHARFUDDIN JJ.) set aside the order of the Deputy Commissioner, saying "there is nothing to show that there was substantial injury to the judgment-debtor by the sale taking place without the beating of the drum, which after all is a very minor formality." The High Court also found that the judgment-debtor (who was a minor represented by his mother) was

properly represented at the time of the sale, and that the Court of Wards was not his proper representative. They made an order confirming the sale.

On this appeal,

*De Gruyther, K. C.*, and *E. U. Eddis*, for the appellant, contended that he was not properly represented in the execution proceedings, and that notice of those proceedings should have been given to the Court of Wards, who ought to have been the appellant's proper representative. The Court of Wards did not in fact represent the minor, as it had not taken charge of the estate, or at any rate, not of Gadi Gandey, the portion which was sold; and the Nazir of the Court at Benares was not either in fact or in law the representative of the appellant in the proceedings in execution of the decree; he had refused to accept notice. The proclamation of sale was not properly made: there were many mouzahs, and the proclamation, instead of in accordance with the directions being served in each mouzah, was only served in one mouzah and without beat of drum. The proclamation also did not contain the particulars directed by section 287 of the Civil Procedure Code, 1882; the proper value of the property did not appear from it. The property was greatly under-valued by the respondent in his application for execution; and the evidence showed that it was sold at a very inadequate price: and the respondent had failed to rebut the presumption that arose from that being the case. Reference was made to sections 284 and 287 of the Civil Procedure Code, 1882; O. XLVIII, rule 5 of the Civil Procedure Code (Act V of 1908), and *Saadatmand Khan v. Phul Kuar* (1). Its value was more than a lakh of rupees, and it was sold for Rs. 2,020. On the authority of

1913

KRISHNA  
PERSHAD  
SINGH  
v.  
MOTI  
CHAND.

1913  
 KRISHNA  
 PERSHAD  
 SINGH  
 v.  
 MOTI  
 CHAND.

that case there had been material irregularity in publishing and conducting the sale for which it should be set aside under section 311 of the Civil Procedure Code.

*Sir Erle Richards, K. C.*, and *Arthur Grey*, for the respondents, contended that neither on the merits nor in law ought the sale to be set aside. There had been no material irregularity, and no substantial injury to the appellant had been proved. On the death of a judgment-debtor, his legal representative was not entitled to notice of sale of property which had been attached in the judgment-debtor's lifetime. Reference was made to *Sheo Prosad v. Hiralal* (1); section 234 of the Civil Procedure Code, 1882. The Court of Wards took over charge of the property: it was shown that the Court of Wards had been in charge of it and had withdrawn from it as being too much encumbered. Under the Court of Wards Act (Ben. Act IX of 1879) the Manager of the Court of Wards had jurisdiction to act in regard to Gadi Gandey, the partition that was sold, as it had absolute power over the property of the minor: see sections 6, 7, 14 and 18. The proposal for compromise was sent to the Court of Wards, who refused to sanction it as the estate was greatly encumbered: the Chota Nagpur Encumbered Estates Act (Ben. Acts VI of 1876 and V of 1884), section 2, was referred to. The Court of Wards, the minor's statutory guardian, having received notice of the sale, did not appear: that is, the Court of Wards offered no objection to the sale, which was consequently confirmed. A petition was filed under section 311 of the Civil Procedure Code to set aside the sale, but it was not proceeded with, and the opposition to the sale was withdrawn. The inquiry by the Court of Wards into the value of the property showed

(1) (1889) I. L. R. 12 All. 440, 444, 446.

it to be hopelessly encumbered, and the Court of Wards exercised a wise discretion in allowing it to be sold. The Court of Wards, after inquiry, having allowed the sale to be confirmed without objection, it was not open to any other person to institute proceedings to set it aside on behalf of the minor.

It was also contended that this appeal was not properly before the Board. Section 51 of the Code of Civil Procedure made it clear that the only person who could represent the minor was the Manager of the Court of Wards. The order of the Deputy Commissioner of 5th December, 1904, confirming the sale was not appealed from by the Court of Wards, and was therefore final and conclusive as against the appellant. It was submitted that the Court below was not competent to hear any appeal on behalf of the minor, unless preferred by the Court of Wards. His mother had no *locus standi* to present it: section 460 of the Civil Procedure Code, 1882, was referred to. Besides, no appeal lay, it was submitted, from the order confirming the sale. Orders under sections 311 and 312 of the Code setting aside or confirming a sale are specified in section 588 as not being subject to a further appeal; that is, the definition of "decree" in section 2 does not include them, and they are final. Section 594, in the portion of the Code relating to appeals to the King in Council, enacts that "decree" includes "judgment" or "order," unless there is "something repugnant in the subject or context." It was submitted that it would be repugnant to put a construction on the word "decree" in section 594 which would include orders made final under section 588. There was no appeal to this Board from anything except what is a "decree" under the Code. There is an appeal to the High Court, but not to the Privy Council. Reference was made to a recent

1913

KRISHNA  
PERSHAD  
SINGH  
v.  
MOTI  
CHAND.



1913  
 KRISHNA  
 PRASAD  
 SINGH  
 v.  
 MOTI  
 CHAND.

decision on the Land Acquisition Act in *Rangoon Botatoung Company v. Collector of Rangoon* (1) where it was held that no appeal lay to the King in Council because it was not expressly given by the Act (1 of 1894): and the Civil Procedure Code, 1882, sections 586, 595, 596 and 598 were also referred to.

*De Gruyther, K. C.*, in reply, contended that section 2 of the Civil Procedure Code, 1882, defined "decree" and "order" for the general purposes of the Code. The word "final" in section 595 means any decision which disposes finally of the rights of parties. Orders made in the course of proceedings in a suit are, some of them, appealable under section 588: other orders, though not made in a suit but by an authorized person in an administrative capacity, were subject to an appeal. The definition of "decree" in section 2 of the Code did not control the interpretation of the word in section 594 in the portion of the Code dealing with appeals to the King in Council: the word "decree" there must be taken as meaning or including "judgment" or "order." The latter interpretation has been expressly introduced in the corresponding section of the latest Civil Procedure Code (Act V of 1908).

As to the right of the widow to appeal, in section 9 of the Court of Wards Act (Ben. Act IX of 1879) "taking charge of the property" were the governing words, and it was clear on the evidence that the Court of Wards did not take actual charge of the property. The order of December, 1903, was not sufficient to vest the property in the Court of Wards. The Act did not apply until the Court of Wards actually took over charge of the minor's property. No objection was taken that the widow had no right to present the petition that the case should be restored to the Court

for rehearing. The widow, it was submitted, had full power to act as she did. To show that the omission to put the representative of the judgment-debtor on the record, or to give him notice of the execution proceedings, was a material irregularity vitiating the validity of the sale, the cases of *Aba v. Dhonda Bai* (1) and *Erava v. Sidramappa* (2) were referred to.

1913  
 KRISHNA  
 PERSHAD  
 SINGH  
 v.  
 MOTI  
 CHAND.

The judgment of their Lordships was delivered by

LORD MOULTON. This is an appeal from an order of the High Court of Judicature at Fort William in Bengal, dated the 18th May, 1908, reversing an order of the Deputy Commissioner of Hazaribagh, dated the 16th February, 1906, which set aside the sale of a property known as Gadi Gandey, which is an impartible zamindari descending by primogeniture situated in that district.

March 6.

The prolonged legal proceedings in relation to this matter give rise to many important questions of law, but, in the view taken by their Lordships as to the rights of the parties, it will not be necessary to decide more than one or two of such questions. To appreciate the points necessary to be so decided, it will be convenient to state first the facts of the case so far as they relate to the sale, and then to deal with the legal proceedings that have been taken with regard to it.

The property originally belonged to the father of the infant appellant, against whom the respondent on the 27th November, 1900, obtained a decree in the Court of the Subordinate Judge of Benares for Rs. 6,599-9-6 and costs. Two years later this decree was transferred for execution to the Court of the Deputy Commissioner of Hazaribagh, and the respondent applied to that Court for execution of the same by attachment and sale of the property. While  
 (1) (1894) I. L. R. 19 Bom. 276, 283, 284. (2) (1895) I. L. R. 21 Bom. 424.

1913  
—  
KRISHNA  
PERSHAD  
SINGH  
v.  
MOTI  
CHAND.

these proceedings were going on, the appellant's father died. The respondent continued the attachment proceedings, and on the 28th October, 1903, applied for and obtained the issue of a sale proclamation fixing the sale for the 2nd January, 1904. It does not appear that notice of any of the proceedings in the attachment was served on any person representing the infant.

The property consisted of 109 mouzahs or villages, and the order for the proclamation of sale directed that the sale proclamation should be served on each of the mouzahs by announcement to the public with beat of drum, and that a copy of the sale proclamation should be fixed at a conspicuous place on each property. What was actually done was as follows. The proclamation was read out without beat of drum in one only of the mouzahs, and the proclamation affixed to a tree in that village alone. The evidence as to this is perfectly clear, and it shows not only that no drum was beaten, but that in the record of the proclamation it was originally so stated. That record has subsequently been altered—evidently fraudulently—to make it appear that it was done with beat of drum.

In addition to these serious irregularities, there is another, which, as it appears on the documents, their Lordships consider that they are entitled and bound to notice. The schedule of the property attached to the proclamation ought to have contained the particulars set out in section 287 of the Code of Civil Procedure, 1882. As a matter of fact, it contained no statement of the encumbrances to which the property was liable. It stated the annual profit income to be Rs. 4,953-7-3, and then stated the value as being Rs. 2,000. To this last matter their Lordships attach importance, because the permission

to bid which the decree-holder obtained from the Court was subject to the condition that the sale should not take place below the estimated value, and inasmuch as their Lordships are of opinion on the evidence that this was a gross under-valuation, their Lordships cannot doubt but that the decree-holder had procured the insertion of this valuation (which corresponded to the amount due to the Government in respect of unpaid taxes, etc.) for the purpose of making possible a purchase by him at this low figure.

What happened on the occasion of the sale is what might have been expected. With the exception of the Collector and the decree-holder, no bidder was present. The Government bidding was Rs. 2,000, the amount due for taxes, etc., from the property. The decree-holder then bid Rs. 2,020, and the property was of course knocked down to him.

Their Lordships have no doubt whatever that the matters above referred to constitute material irregularities in the publishing and conducting of the sale within the meaning of section 311 of the Code of Civil Procedure, 1882. There is abundant evidence that the infant appellant sustained substantial injury through such irregularities. The evidence of Maulvi Syed Ejabat Hossain, who was a Manager under the Court of Wards, and who had occasion to examine into the property shortly subsequent to the sale shows that in his opinion the property was sufficiently valuable to pay all the debts due to the judgment-creditors. At a later stage of the proceedings it became necessary to ascertain the value of the property and the amount of the encumbrances thereon, and the Court referred the matter to a special referee. He heard evidence on both sides, and reported that the property was worth more than two

1913

KRISHNA  
PERSHAD  
SINGH  
v.  
MOTI  
CHAND.

1913  
KRISHNA  
PERSHAD  
SINGH  
v.  
MOTI  
CHAND.

lakhs of rupees after allowing for all the encumbrances. Against this evidence nothing has been cited to show that the valuation on the sale proclamation was a fair one, or that the price obtained was adequate. It is true that counsel for the respondent called their Lordships' attention to a letter written in the course of certain negotiations for a compromise, in which it would appear that some official of the Court of Wards was not prepared to advise that a sum of Rs. 9,000 should be paid to get rid of the sale, unless the estate (which was no doubt heavily encumbered) could be wound up with the assistance of the Encumbered Estates Act. But the statements in such letter, even if they supported the contention of the respondent, would not be evidence, unless the writer were called and his source of information disclosed. As it stands it is merely an expression of opinion by a person who, presumably, had no personal knowledge of the matter, and this can have no evidential value. Even if accepted, it would point to the property being of a value of more than four times the sum which the decree-holder paid for it under the sale in question.

The above facts establish a clear case for setting aside the sale. The sole question, therefore, is whether the legal proceedings for setting aside the sale have been regular, so that their Lordships have jurisdiction to give the relief prayed for in this appeal.

For the purposes of this part of the case it will be necessary to give in some detail an account of the legal proceedings that have taken place in the matter. The original action was in the Court of the Subordinate Judge of Benares. In 1903 the suit was remitted to the Court of the Deputy Commissioner at Hazaribagh for the purpose of execution, and on the

11th June, 1903, he issued an attachment order against the property. The decree-holder applied for the issue of a sale proclamation, which for some reason was ineffective. A fresh sale proclamation was then applied for, which was directed to issue, fixing the 1st September for the sale. The report relating to the service of this sale proclamation was submitted on the 6th August. In the meantime the judgment-debtor had died on the 27th July, 1903. At that date an order had been made for the issue of a sale proclamation for sale on the 1st September, but the sale proclamation had not been served. On the 30th July the decree-holder applied for the issue of notice on the heir of the deceased judgment-debtor, and the record states that an order was made for that issue, but there is nothing to show that anything was done under it. It is probable that the decree-holder tried to effect service on the Nazir of the Court of Benares, but that the latter refused to accept it. The sale could not be held under the sale proclamation of the 27th July 1903, and the decree-holder applied for the issue of a fresh one on the 7th September and obtained the issue of a sale proclamation, fixing the sale for the 2nd November. The service of this sale proclamation was, however, irregular, and on the 28th October he applied for and obtained one, fixing the sale for the 2nd January, 1904. Subsequently he obtained permission to bid at the sale, but such permission was coupled with the condition that the sale should not take place below the estimated price. This permission was only obtained on the day of the sale, and on that day he purchased the property for Rs. 2,020.

It would appear that the whole of the proceedings subsequent to the death of the original judgment-debtor were without notice to anyone representing the infant. It is true that, in the original proceedings

1913  
KRISHNA  
PERSHAD  
SINGH  
v.  
MOTI  
CHAND.

1913  
—  
KRISHNA  
PERSHAD  
SINGH  
v.  
MOTI  
CHAND.

in the local Court of Benares in the life-time of his father, he and three other minors were added as defendants, and the Nazir of that Court was appointed *pro forma* guardian to them for the purposes of the suit. When, however, the proceedings were transferred to the Court of the Deputy Commissioner of Hazaribagh, it was obviously impossible for him to act in this capacity, and he refused so to do. From and after the death of the judgment-debtor and down to the time of the actual sale there was, therefore, no effective representative of the infant heir. On the day of the sale Narayan Kumari, the mother of the infant, applied for a postponement, but it was refused, and on the 26th January, 1904, she, as the natural guardian of the infant and on his behalf, presented a petition for setting aside the sale, alleging adequate grounds for so doing. The proceedings on this petition continued for some months. At this date the Court of Wards had taken possession of some portion of the infant's property (but not of Gadi Gandey), and the mother of the infant tried to induce them to intervene with regard to the sale. This led to proceedings in the Court which are difficult to understand. The Deputy Commissioner appears to have provisionally invited the Manager of another portion of the infant's property to appear and file objections to the sale of Gadi Gandey, and for some time it was doubtful whether or not the Court of Wards would take charge of that property, and, if so, whether they would intervene in the legal proceedings, or would take steps to bring about a compromise with the decree-holder. But all this ultimately came to nothing, and on the 5th December 1904, finding that the Court of Wards did not appear at the hearing fixed for that date, the Deputy Commissioner made an order confirming the sale.

The mother of the infant who had presented the petition only learnt of the making of this order after the event. She was in ignorance that the Court of Wards had declined to interfere in the matter. On learning what had happened she presented a petition for a review of the order confirming the sale and praying to have it set aside. After protracted proceedings, for the purpose chiefly of taking the necessary evidence, the Deputy Commissioner, on the 16th February, 1906, allowed the prayer of the petition, having previously decided that sufficient cause had been shown to justify the delay in presenting it. From this decision an appeal was brought to the High Court of Judicature at Fort William. That Court set aside the decision of the Deputy Commissioner, and from that decision the present appeal is brought.

The first contention against the competency of this appeal is based on the provisions of Ch. 45 of the Code of Civil Procedure, 1882, which was in force at the date of the appeal. This Chapter regulates appeals to the King in Council. Section 594 provides that in that Chapter the expression "decree" includes also "judgment" and "order," unless there be something repugnant in the subject or context. But it is argued that orders for confirming or setting aside a sale made under sections 311 and 312 are nevertheless excluded from the expression "decree" in this Chapter, because they are included in the orders mentioned in section 588. The reasoning is as follows:—In the definition of "decree" in section 2 "orders" specified in section 588 are not included in the word "decree." Moreover section 588 provides that "the orders passed in appeal under this section shall be final." It is therefore contended that it would be repugnant to give to the word "decree" in Ch. 45 a meaning which would include "orders" under section

1913

---

 KRISHNA  
 PERSHAD  
 SINGH  
 v.  
 MOTI  
 CHAND.



1913  
KRISHNA  
PERSHAD  
SINGH  
v.  
MOTI  
CHAND.

in the local Court of Benares in the life-time of his father, he and three other minors were added as defendants, and the Nazir of that Court was appointed *pro forma* guardian to them for the purposes of the suit. When, however, the proceedings were transferred to the Court of the Deputy Commissioner of Hazaribagh, it was obviously impossible for him to act in this capacity, and he refused so to do. From and after the death of the judgment-debtor and down to the time of the actual sale there was, therefore, no effective representative of the infant heir. On the day of the sale Narayan Kumari, the mother of the infant, applied for a postponement, but it was refused, and on the 26th January, 1904, she, as the natural guardian of the infant and on his behalf, presented a petition for setting aside the sale, alleging adequate grounds for so doing. The proceedings on this petition continued for some months. At this date the Court of Wards had taken possession of some portion of the infant's property (but not of Gadi Gandey), and the mother of the infant tried to induce them to intervene with regard to the sale. This led to proceedings in the Court which are difficult to understand. The Deputy Commissioner appears to have provisionally invited the Manager of another portion of the infant's property to appear and file objections to the sale of Gadi Gandey, and for some time it was doubtful whether or not the Court of Wards would take charge of that property, and, if so, whether they would intervene in the legal proceedings, or would take steps to bring about a compromise with the decree-holder. But all this ultimately came to nothing, and on the 5th December 1904, finding that the Court of Wards did not appear at the hearing fixed for that date, the Deputy Commissioner made an order confirming the sale.

The mother of the infant who had presented the petition only learnt of the making of this order after the event. She was in ignorance that the Court of Wards had declined to interfere in the matter. On learning what had happened she presented a petition for a review of the order confirming the sale and praying to have it set aside. After protracted proceedings, for the purpose chiefly of taking the necessary evidence, the Deputy Commissioner, on the 16th February, 1906, allowed the prayer of the petition, having previously decided that sufficient cause had been shown to justify the delay in presenting it. From this decision an appeal was brought to the High Court of Judicature at Fort William. That Court set aside the decision of the Deputy Commissioner, and from that decision the present appeal is brought.

The first contention against the competency of this appeal is based on the provisions of Ch. 45 of the Code of Civil Procedure, 1882, which was in force at the date of the appeal. This Chapter regulates appeals to the King in Council. Section 594 provides that in that Chapter the expression "decree" includes also "judgment" and "order," unless there be something repugnant in the subject or context. But it is argued that orders for confirming or setting aside a sale made under sections 311 and 312 are nevertheless excluded from the expression "decree" in this Chapter, because they are included in the orders mentioned in section 588. The reasoning is as follows:—In the definition of "decree" in section 2 "orders" specified in section 588 are not included in the word "decree." Moreover section 588 provides that "the orders passed in appeal under this section shall be final." It is therefore contended that it would be repugnant to give to the word "decree" in Ch. 45 a meaning which would include "orders" under section

1913

KRISHNA  
PERSHAD  
SINGH  
r.  
MOTI  
CHAND.

1913  
KRISHNA  
PERSHAD  
SINGH  
v.  
MOTI  
CHAND.

in the local Court of Benares in the life-time of his father, he and three other minors were added as defendants, and the Nazir of that Court was appointed *pro forma* guardian to them for the purposes of the suit. When, however, the proceedings were transferred to the Court of the Deputy Commissioner of Hazaribagh, it was obviously impossible for him to act in this capacity, and he refused so to do. From and after the death of the judgment-debtor and down to the time of the actual sale there was, therefore, no effective representative of the infant heir. On the day of the sale Narayan Kumari, the mother of the infant, applied for a postponement, but it was refused, and on the 26th January, 1904, she, as the natural guardian of the infant and on his behalf, presented a petition for setting aside the sale, alleging adequate grounds for so doing. The proceedings on this petition continued for some months. At this date the Court of Wards had taken possession of some portion of the infant's property (but not of Gadi Gandey), and the mother of the infant tried to induce them to intervene with regard to the sale. This led to proceedings in the Court which are difficult to understand. The Deputy Commissioner appears to have provisionally invited the Manager of another portion of the infant's property to appear and file objections to the sale of Gadi Gandey, and for some time it was doubtful whether or not the Court of Wards would take charge of that property, and, if so, whether they would intervene in the legal proceedings, or would take steps to bring about a compromise with the decree-holder. But all this ultimately came to nothing, and on the 5th December 1904, finding that the Court of Wards did not appear at the hearing fixed for that date, the Deputy Commissioner made an order confirming the sale.

The mother of the infant who had presented the petition only learnt of the making of this order after the event. She was in ignorance that the Court of Wards had declined to interfere in the matter. On learning what had happened she presented a petition for a review of the order confirming the sale and praying to have it set aside. After protracted proceedings, for the purpose chiefly of taking the necessary evidence, the Deputy Commissioner, on the 16th February, 1906, allowed the prayer of the petition, having previously decided that sufficient cause had been shown to justify the delay in presenting it. From this decision an appeal was brought to the High Court of Judicature at Fort William. That Court set aside the decision of the Deputy Commissioner, and from that decision the present appeal is brought.

The first contention against the competency of this appeal is based on the provisions of Ch. 45 of the Code of Civil Procedure, 1882, which was in force at the date of the appeal. This Chapter regulates appeals to the King in Council. Section 594 provides that in that Chapter the expression "decree" includes also "judgment" and "order," unless there be something repugnant in the subject or context. But it is argued that orders for confirming or setting aside a sale made under sections 311 and 312 are nevertheless excluded from the expression "decree" in this Chapter, because they are included in the orders mentioned in section 588. The reasoning is as follows:—In the definition of "decree" in section 2 "orders" specified in section 588 are not included in the word "decree." Moreover section 588 provides that "the orders passed in appeal under this section shall be final." It is therefore contended that it would be repugnant to give to the word "decree" in Ch. 45 a meaning which would include "orders" under section

1913

KRISHNA  
PERSHAD  
SINGH  
v.  
MOTI  
CHAND.

1913  
KRISHNA  
PERSHAD  
SINGH  
v.  
MOTI  
CHAND.

588. "Orders" setting aside or refusing to set aside sales of immovable property are therefore not appealable to the King in Council.

Their Lordships are unable to accept this contention. The Code in express terms adopts for the purposes of Ch. 45 a definition of "decree," which is special and differs from the meaning that it bears elsewhere in the Act. The definition of "decree" in section 2 is therefore not applicable, and the word "decree" in this Chapter must be read as equivalent to "decree, judgment or order." As so read there is no difficulty in construing section 595, which determines when an appeal lies to the King in Council. If this substitution be made, it is evident that final orders may be appealed against, and therefore the provision at the end of section 588, providing that orders passed in appeal under that section shall be final, cannot restrict the provision that appeals may be brought to the King in Council from them. It should be added that appeals of this nature have frequently been heard by this Board in times past, so that the consistent practice of the Board is at variance with this contention of the respondent. Moreover, no reason can be given why orders of so important a character as those made under sections 311 and 312, which deal finally with the rights of parties, should be excluded from the privilege of an appeal.

But the main contention of the respondent was to the effect that the mother of the infant could not represent him in these proceedings. It is so obvious that the Nazir of the local Court of Benares did not in fact represent the infant during any portion of the proceedings in the Court of Hazaribagh, that neither before their Lordships nor in the Courts below was there any substantial contention that he continued to represent the infant after the removal of the

proceedings to that Court. But it was contended that the only representative of the infant at the time of the sale and subsequently was the Court of Wards. It appears that on the 23rd December, 1903, the Court of Wards made an order taking over the management of some part of the property of the infant. That order was not in evidence, and there is nothing in the record which enables their Lordships to ascertain its terms, but it is clear that the Court of Wards did not in fact take over Gadi Gandey at any time. There are concurrent findings to this effect in the Courts below, and their Lordships have independently arrived at the same conclusion. Their Lordships are therefore of opinion that inasmuch as the interests of the infant with regard to this property were not in fact represented by the Court of Wards, it was open to the mother as natural guardian to appear in the name of the infant to protect this property from sale, and that it was the only way of preventing his interests with regard thereto being sacrificed. The proceedings taken by her were therefore in order, and the appeal from them is properly before their Lordships.

Their Lordships will therefore humbly advise His Majesty that the appeal be allowed and the order of the High Court be discharged with costs and the order of the Deputy Commissioner restored, and that the respondent be ordered to pay the costs of this appeal.

*Appeal allowed.*

Solicitors for the appellant: *Dallimore, Pilbrow & Co.*

Solicitors for the respondent: *Watkins & Hunter.*

J. V. W.

1913  
KRISHNA  
PERSHAD  
SINGH  
v.  
MOTI  
CHAND.

## FULL BENCH.

*Before Jenkins C.J., Hurlington, Stephen, Mookerjee and Holmwood JJ.*

1913

March 28.

HIRALAL SINGHA

v.

TRIPURA CHARAN RAY.\*

*Hindu law—Stridhan—Prostitute's property, succession to.*

The mere fact that a Hindu woman has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood; and, consequently, her *stridhan* property passes, upon her death, in the absence of nearer heirs, to her brother's son as an heir under the Bengal school of Hindu law.

*Tara Munnee Dossee v. Motee Buncawee* (1), *Ramuath Tolapattro v. Durgu Sundari Debi* (2), *In the goods of Kamineymoney Bewah* (3), *Ramanunda v. Raikishori Barmani* (4), *Sarna Moyee Bewa v. Secretary of State for India* (5) and *Sundari Letani v. Pitambari Letani* (6) overruled so far they hold that tie of blood is destroyed by unchastity or, in the case of a Hindu woman, by her adopting the life of a prostitute.

*Bisheshur v. Mata Gholam* (7), *Musammatt Gunga Jati v. Ghasita* (8), *Adryajni v. Rudrara* (9), *Kojiyadu v. Lakshmi* (10), *Subbaraya Pillai v. Ramasami. Pillai* (11), *Bhutanath Mondol v. Secretary of State for India* (12), *Sundari Dossee v. Nemye Charan Das* (13) and *Tripura Charan Banerjee v. Hurimati Dassi* (14) approved.

*Sirasanga v. Minul* (15) and *Narasanna v. Gangu* (16) distinguished and dissented from.

\* Reference to Full Bench in Appeal from Appellate Decree, No. 3147 of 1909.

- |                                   |                                   |
|-----------------------------------|-----------------------------------|
| (1) (1846) 7 Mac. Sel. Rep. 325 ; | (8) (1875) I. L. R. 1 All. 46.    |
| 8 I. D. (O. S.) 247.              | (9) (1879) I. L. R. 4 Bom. 104.   |
| (2) (1878) I. L. R. 4 Cal. 550.   | (10) (1881) I. L. R. 5 Mad. 149.  |
| (3) (1894) I. L. R. 21 Cal. 697.  | (11) (1899) I. L. R. 23 Mad. 171. |
| (4) (1894) I. L. R. 22 Cal. 347.  | (12) (1906) 10 C. W. N. 1085.     |
| (5) (1897) I. L. R. 25 Cal. 254.  | (13) (1907) 6 C. L. J. 372.       |
| (6) (1905) I. L. R. 32 Cal. 371.  | (14) (1911) I. L. R. 38 Cal. 493. |
| (7) (1870) 2 All. H. C. 300.      | (15) (1889) I. L. R. 12 Mad. 277. |
| (16) (1889) I. L. R. 13 Mad. 133. |                                   |

REFERENCE to a Full Bench by Stephen and Richardson JJ.

The facts of the case are fully set out in the Order of Reference which was as follows :

This is a second appeal which arises as follows : The suit is for rent for a house at Rs. 15 a month from September, 1905, to August, 1908, to which the plaintiff claims to be entitled under a *kabala*, dated the 20th July, 1908, executed in his favour by Harachand Jahal, which transferred to him not only the house but also rents in arrear from the defendant in respect of it. He is therefore suing for Rs. 690 in arrears and Rs. 15 that has accrued due since his purchase. Harachand purported to execute the *kabala* as being entitled to eight annas of the property conveyed by purchase, and to the other eight annas by inheritance from his aunt Dayamoyee Dasee who originally bought the property with him. The findings of fact in the Court below show that Harachand had a good title to the eight annas share, that Hiralal Singha, the appellant, was tenant of Harachand and Dayamoyee—this is in effect found as a matter of fact though it is treated as a matter of estoppel—and that the *kabala* set up by the plaintiff is a binding document. It is an admitted fact that Dayamoyee was a prostitute, and it is found that Harachand is the son of her brother and heir to Dayamoyee, except in so far as he may be prevented from being so by the fact that Dayamoyee was a prostitute. The plaintiff is a pleader of the Howrah Court.

On these facts the appellant, defendant No. 1, has raised the following points of law :—(1) that this suit is really a title suit, and has been improperly framed as a rent suit ; (2) that the plaintiff has not made out a title, and that Harachand was not heir to Dayamoyee ; and (3) that the claim to arrears of rent brought by the plaintiff is an actionable claim and cannot therefore be enforced in any Court under section 136 of the Transfer of Property Act.

On the first point we are of opinion that this is a real rent suit, and not such as is referred to in *Golam Mahomed Shahu v. Sharoda Pershad Mullick* (1).

On the third point we are of opinion that the right to arrears of rent purchased is an actionable claim under section 136 of the Transfer of Property Act, and that the plaintiff cannot therefore enforce it in any Court. But the result of this affects only Rs. 690 of the plaintiff's claim, and does not touch the Rs. 15 falling due after the date of the *kabala*.

As to the second point, two matters arise for consideration. The first is that the lower Appellate Court has held that Hiralal, the defendant,

1913

HIRALAL  
SINGHA  
v.  
TRIPURA  
CHARAN  
RAY.



1913  
 HIRALAL  
 SINGHA  
 v.  
 TRIPURA  
 CHARAN  
 RAY.

appellant, is estopped from denying that he was the tenant of Dayamoyee and Harachand by his assertion that he was such a tenant in a previous suit brought against him by one who is not a party to this suit, and also by the fact that he was inducted into possession by Dayamoyee and Harachand. In our opinion the lower Court was wrong in treating the first of these matters as giving rise to estoppel, and whether he was right or wrong in treating the second in the same way does not matter, because he was considering it only from the point of view of a title set up in one Matangini, with which we are not now concerned. But the findings relating to both of these incidents lead to the same conclusion as that at which the Judge arrives, namely, that Hiralal was the tenant of Dayamoyee and Harachand who were entitled as landlords.

The second matter is that Dayamoyee was a prostitute, and that the question of how a prostitute's property descends on her death has therefore to be decided in respect at least to one-half of the rent that has accrued due since the date of the plaintiff's *kabala*.

The rule followed by this Court in this matter is that unchastity in a woman, a term which includes prostitution, degrades her and severs the connection between her and the undegraded members of her family, so that the latter cannot take her property by inheritance; but its soundness has been doubted in this Court and others. The various authorities on the question have been set out in the recent case of *Tripura Charan Banerjee v. Harimati Dassi* (1), decided by a member of this Bench sitting on the Original Side, from which we quote as follows:—

“This was acted on by this Court in *Tara Munnee Dossee v. Motee Buneanee* (2), where on a question of inheritance two prostitute daughters of a prostitute were preferred to two grandsons of an undegraded daughter. It was acted on again in *In the goods of Kamineymoney Bewah* (3), where the son of a sister of the husband of a prostitute was held not qualified to apply for revocation of probate of the prostitute's will. The decision was approved of in *Sarna Moyee Bewa v. Secretary of State* (4), where a prostitute sister applied for letters of administration to a prostitute. These cases were followed in *Bhutnath Mondol v. Secretary of State* (5), where letters of administration were refused to the sons of the brother of the deceased husband of a prostitute, through Woodroffe J. doubted the soundness of the rule. This doubt made itself felt again in *Sundari Dossee v. Aemye Charan Dair* (6), where letters were refused to the prostitute daughter of a sister of a prostitute. The case was covered by

(1) (1911) I. L. R. 38 Cal. 493.

(2) (1846) 7 Mac. Sel. Rep. 325.

(3) (1894) I. L. R. 21 C.L. 697.

(4) (1897) I. L. R. 25 Cal. 254.

(5) (1906) 10 C. W. N. 1085.

(6) (1907) 6 C. L. J. 372.

*Sarna Moyee Beera v. Secretary of State* (1), but the Court disapproved of the decision in *In the goods of Kamineymoney Bewah* (2), as being inconsistent with the decision in *Sarna Moyee Beera v. Secretary of State* (1)

"The rule has been followed in *Sirasangu v. Minal* (3), where among four children of a prostitute of whom two daughters were also prostitutes, one of such daughters was preferred as heir to the other in preference to the sons of one of the brothers, who were born in wedlock. This decision seems to have been based in part on *Tara Munnee Dossea v. Motee Buneanee* (4), and it was followed in *Narasanna v. Gangu* (5). But it with others to the same effect, was considered in *Sarna Moyee Beera v. Secretary of State* (1), 'as based more or less on local custom and usage'.

"On the other hand in *Subbaraya Pillai v. Ramasami Pillai* (6), where an undegraded relation claimed to inherit from a woman, it was held that her adultery did not sever the bond between her natural relations and herself so far as to disentitle them to inherit from her; and the same principle was followed in *Narain Das v. Tirllok Tirari* (7), where the question was whether a natural relation could execute a decree obtained by a deceased degraded woman against a stranger.

"On these authorities I find myself unable to hold that the rule laid down in *Kamineymoney Bewah's* case (2) is wrong; it has been recognised in a series of decisions in this Court, and has never been actually departed from. I do not consider the Madras cases as strong authority on the other side; Woodroffe J.'s doubts as to its soundness were not strong enough to prevent him acting on it, and the opinion expressed in *Sundari Dossee v. Nemye Charan Daw* (8), was in fact *obiter*. The decisions in *Subbaraya Pillai v. Ramasami Pillai* (6), and *Narain Das v. Tirllok Tirari* (7), certainly raise considerable doubt but not enough to make it right for me to depart from what seems to have been the constant course of decisions in this Court. I therefore hold that Sowdamini's prostitution severed her as far as inheritance is concerned from her natural relations."

On the authorities quoted we agree with the Judge in entertaining doubts as to the correctness of the rule in question, which is laid down most authoritatively perhaps in *Sarna Moyee Beera v. Secretary of State for India* (1). The matter has never been dealt with by a Full Bench and the question now before us is of constant occurrence.

We, therefore, refer this appeal to a Full Bench for decision.

- |                                   |                                  |
|-----------------------------------|----------------------------------|
| (1) (1897) I. L. R. 25 Calc. 254. | (5) (1889) I. L. R. 13 Mad. 133. |
| (2) (1894) I. L. R. 21 Calc. 697. | (6) (1899) I. L. R. 23 Mad. 171. |
| (3) (1889) I. L. R. 12 Mad. 277.  | (7) (1906) I. L. R. 29 All. 4.   |
| (4) (1846) 7 Mac. Sel. Rep. 325 ; | (8) (1907) 6 C. L. J. 372.       |
| 8 I. D. (O. S.) 247.              |                                  |

1913  
HIRALAL  
SINGHA  
v.  
TRIPURA  
CHARAN  
RAY.

1913  
 HHALAL  
 SINGHA  
 v.  
 TRIPURA  
 CHARAN  
 RAY.

*Mr. S. P. Sinha* (with him *Babu Golapchandra Sarkar, Dr. Dwarkanath Mitra, and Babu Prabodhchandra Roy*), for the appellant. It has been consistently held in this Court that prostitution severs the tie of blood. *Sundari Dossee v. Nemye Charan Daw* (1) is the only exception. All other decisions are concurrent. Neither children before unchastity, nor husband's heirs, can inherit. It is assumed in this case that this was property of her own earning. There is no question of *stridhan*. The only question is, who are her heirs?

The Sudder Dewani case of *Tara Munnee Dossee v. Motee Buneanee* (2) has been followed in several cases in this Court and in Madras: *In the goods of Kamineymoney Bewah* (3), *Sarna Moyee Bewa v. Secretary of State for India* (4). Fletcher J. in *Sundari Dossee's* case (1) wrongly supposes that *Sarna Moyee's* case (4) has negatived the judgment in *In the goods of Kamineymoney Bewah* (3). In *Bhutnath Mondol v. Secretary of State for India* (5) also, the Judges read *Sarna Moyee's* case (4) as following *Kamineymoney's* case (3). Fletcher J.'s judgment in *Sundari Dossee's* case (1) is an *obiter* on this point. In the Full Bench reference in *Chatoo Kurmi v. Rajaram Tewari* (6) doubt was thrown on the correctness of the rule laid down in *In the goods of Kamineymoney Bewah* (3). That reference came to nothing. The contrary views expressed in the recent cases of *Subbaraya Pillai v. Ramasami Pillai* (7), *Narain Das v. Tirllok Tiwari* (8), *Sundari Dossee v. Nemye Charan Daw* (1) and *Tripura Charan*

(1) (1907) 6 C. L. J. 372.

(2) (1846) 7 Mac. Sel. Rep. 325.

(3) (1894) I. L. R. 21 Cal. 697.

(4) (1897) I. L. R. 25 Cal. 254.

(5) (1906) 10 C. W. N. 1085.

(6) (1909) 11 C. L. J. 124.

(7) (1899) I. L. R. 23 Mad. 171.

(8) (1906) I. L. R. 29 All. 4.

*Bannerjee v. Harimati Dassi* (1) and referred to in the order of reference are not all applicable. In the last mentioned case, the son was born after degradation.

There is no doubt that according to the Hindu law such a woman is degraded and becomes an outcast. She is civilly dead. It is not mere adultery that degrades the woman, but lapsing into the condition of a prostitute: Sarkar's Hindu Law, 4th Ed., Ch. X, pp. 368 and 370 (for texts). In *Subbaraya Pillai v. Ramasami Pillai* (2), the question of the nature of degradation did not arise. There is no question here of competition between degraded children of a prostitute and other children. In *Narain Das v. Tirlol Tivari* (3) it was the husband who claimed succession, and it was held that degradation of a wife did not sever her relation with the husband. The converse proposition mentioned in the Allahabad case does not necessarily follow in India, or in England either.

*Babu Golapchandra Sarkar* (following *Mr. Sinha*). Degradation operates as civil death and opens succession to the property of the degraded person. Besides the texts of Manu, see Dayabhaga, Chapter I, paragraphs 30, 31 and 44. See Raghunandan as to the effects of sinful acts and penance: "Prayaschittatwa" (Jibananda Vidyasagar's edition), Volume I, page 544: "प्रायश्चित्तैरपह्नो यदज्ञानघ्नतं भवेत् । कामनोऽथ ब्रह्मचार्यस्तु वचनादेव जायते ।" All this shows that the relationship is totally severed. Banerji J.'s judgment speaks of penance. Sin has twofold effects. It causes liability to go to the infernal regions and exclusion from social intercourse. There is a difference between

1913  
HIMALAL  
SINGHA  
v.  
TRIPURA  
CHARAN  
RAY.

(1) (1911) I. L. R. 38 Calc. 493. (2) (1899) I. L. R. 23 Mad. 171.

(3) (1906) I. L. R. 29 All. 4.

1913  
 HIRALAL  
 SINGHA  
 v.  
 TRIPURA  
 CHARAN  
 RAY.

the Mitakshara and the Bengal school with respect to the effect of penance. According to the Bengal school, the sin is purged off by penance, but the exclusion from society remains. But the Mitakshara school maintains that by penance the bar of social excommunication is removed, but the liability to go to hell continues. Raghunandan is the authority in Bengal. Raghunandan says that the effect of penance is to remove liability to go to hell, but penance does not remove barriers to social intercourse.

The question of penance does not arise, as no penance was performed in this case and no one ever heard of a prostitute taken back in society. It is an academic discussion. So far as the children of degraded parents go, they are heirs. A new relationship is started on birth of children. See also Yajnavalkya, Book III, 298, and Manu, Chapter XI, 183-4.

*Dr. Rashbehary Ghose* (with him *Babu Brajalal Chakrabarti* and *Babu Mohinimohan Chatterji*), for the respondents. There is no uniform course of decisions in this Court, as pointed out in *Chatoo Kurmi v. Rajaram Tewari* (1). The judgment in *Tara Munnee Dosset v. Motee Buneanee* (2) is not supported by texts. In *Sarna Moyee Bewa v. Secretary of State for India* (3), Babu Golapchandra boldly contended that the Succession Act would apply. That is certainly wrong, because by being a prostitute one does not become a non-Hindu. What does "civilly dead" mean? Not that she is actually dead or that she is outside the pale of Hinduism. The decision in *Sarna Moyee's* case (3) is so far in my favour that by degradation a woman does not cease to be a Hindu, and that succession in such a case would be according

(1) (1909) 11 C. L. J. 124, 127. (2) (1846) 7 Mac. Sel. Rep. 325.

(3) (1897) I. L. R. 25 Cal. 254.

to Hindu law. It is for the other side to show what the law is if it be not Hindu law. In *Hari Lal Singha v. Rup Manjori Burmoni* (1) the Judges point out that there is a divergence of opinion in the Courts and between cases. In *Subbaraya Pillai v. Ramasami Pillai* (2). Ayyar J. deals with causes of degradation. Those causes may hardly be said to have those effects in these days. There is no rule of Hindu law that only a degraded woman succeeds to the properties of a degraded relation: *Bisheshur v. Mata Gholam* (3).

[MOOKERJEE J. In that Madras case, the brother's son would have been the heir but for the degradation.]

Yes, as in *Tripura Charan Bannerjee v. Harimati Dassi* (4).

Here the man and the woman are both Hindus, though of different castes. If there is no special provision for such cases in Hindu law, the ordinary Hindu law will apply. The onus is on the other side to show that it does not. In *Narain Das v. Tirlok Tiwari* (5), there was a competition between the degraded and the undegraded relation.

It would be inequitable to hold that degraded relations may succeed to the property of undegraded persons, but the undegraded ones may not to the property of the degraded, simply because they did not become degraded.

*Babu Brajalal Chakrabarti* (following *Dr. Ghose*). The texts relied on by the other side provide only for social excommunication. The offender is removed from the locality with ceremonies similar to funeral obsequies. This excommunication is not absolute.

(1) (1912) 15 I. C. 137.

(3) (1870) 2 All. H. C. 300.

(2) (1899) I. L. R. 23 Mad. 171.

(4) (1911) I. L. R. 38 Calc. 493.

(5) (1906) I. L. R. 29 All. 4.

1913  
 HIRALAL  
 SINGHA  
 v.  
 TRIPURA  
 CHARAN  
 RAY.

It means a temporary suspension of social rights, which are restored on performance of penance: see Manu, Chapter XI, verses 55, 187, 188 and 190, and Shabdakalpadruma, First Edition, page 2775, under headings 'Prayaschitta' and 'Patita.' This mode of excommunication does not apply to a female. She is to be kept under protection and to be maintained: see Manu, Chapter XI, verses 189, and Yajnavalkya, Book III, verses 295-7. So in her case there can not be an absolute severance of connexion. It appears from the Shabdakalpadruma that unchastity is of various grades, and except in a very few cases of incest it is capable of expiation. Srikrishna Tarkalankar, while commenting on the text of the Dayabhaga barring the inheritance of a degraded person, says that it is so barred only if the performance of penance has become impossible. See also Viramirodaya, Sastri's Translation, page 37. This again refers to inheritance by, and not from, a degraded person. The subsistence of the connexion is clear from the fact that the natural relations have to perform the obsequial ceremonies of a degraded person. See the Shabdakalpadruma cited above. This indicates that they are competent to inherit. The subsistence of the connexion with the natural relations is clear also from the fact that the Mitakshara, in the chapter on Debts, v. 52, describes the degraded woman as the property of her husband, and the husband's debts are payable by the paramour of the degraded wife: see also Narada, Part I, Chapter III, vs. 21-26. The Prayaschittatatwa does not bear on the point, as it does not say any thing about civil rights. The text of the Dayabhaga, excluding a degraded person from inheritance, is not supported by the text of Narada it is based upon. The word used by Narada is *binashta*, and practically the same word,

*i.e.*, *nashta*, has been used by Narada in another text where the meaning could not be degradation. Its meaning is simply disappearance; see Dayabhaga, Chapter I, secs. 30, 32 and 33; Narada, Part II, Chapter XIII, v. 3, and Part II, Chapter XII, v. 7; see also reference to the Dayatattwa in Colebrooke's Translation. Assuming that there was forfeiture of property on degradation, coupled with impossibility of performing penance, the forfeiture could have effect only at her death, and so succession was to open at that moment.

*Babu Golapchandra Sarkar*, in reply. The Dayabhaga may or may not be right in its interpretation of Narada. Your Lordships are, however, bound to follow Dayabhaga. The words *nasta*, and *binasta* mean the same thing. They do not mean 'perished,' though one of those words might have been used to mean so in a lonely passage somewhere. Degradation must entail exclusion from inheritance. A degraded person is an outcast: Dayabhaga, Chapter V, paragraphs 7, 10, 11 and 12. Chapter V of the Dayabhaga deals with exclusion from inheritance. Succession to the degraded person's property is not in question in the Chapter on Exclusion from Inheritance. Succession opens at the moment of degradation: Dayabhaga, Chapter I, paragraphs 30, 31.

The Parasara-Smriti as explained in Parasara Madhab (see Volume II, pages 284, *et seq.*, Asiatic Society Edition) is the law for the *Kali Yuga*: see also Brahmbaibarta Purana, Prakritikhand, Ch. 31. Raghunandan is the paramount authority here now in all questions other than inheritance in which the Dayabhaga is the highest authority. It is plain that a degraded woman is as good as dead. She may, no doubt, have her sins purged off by penance; but she can never regain the social tie severed.

1912

HIRALAL  
SINGHA  
v.  
TRIPURA  
CHARAN  
RAY.



1912

HARALAL  
SINGHA  
v.  
TRIPURA  
CHARAN  
RAY.

[MOOKERJEE J. On what does the right of succession depend?]

On relationship. But a woman loses her relationship after degradation.

[MOOKERJEE J. How can that be true of blood-relations? I am not speaking of change of status by degradation. Is it not a significant fact that in the early texts there are no special rules for succession to properties of unchaste women?]

True, there are no special rules. But ancient Law-givers were, no doubt, aware of the existence of prostitutes. The natural inference is that their existence is not recognized: see *Sheonauth Rai v. Mussumant Dayamyee Chowdbrin* (1), where the pandit said that penance would remove the sin, but it could not restore right to succession. The case is noticed in Strange's Elements of Hindu Law (Ed. 1825), Vol. I, p. 222. See also *Doe dem. Saummoney Dossee v. Nemy Churn Doss* (2), *Matunginee Dabee v. Joykallee Dabee* (3), *Ramnath Tolapattro v. Durga Sundari Debi* (4) and *Ramnanda v. Raikishori Barnani* (5).

An unchaste mother or daughter is not entitled to succeed. The reasoning in *Narain Das v. Tirlok Tiwari* (6) is inapplicable in this case.

I contend that the current of decisions since 1812 is practically uniform and is in my favour. *Sarna Moyee Bewa v. Secretary of State for India* (7) is not against me. It only lays down that the sister is no heir. See also Stokes' Hindu Law, p. 666.

*Cur. adv. vult.*

- |                                   |                                   |
|-----------------------------------|-----------------------------------|
| (1) (1814) 2 Mac. Sel. Rep. 137 ; | (3) (1869) 14 W. R. (O. C.) 23.   |
| 6 I. D. (O. S.) 462.              | (4) (1878) I. L. R. 4 Calc. 550.  |
| (2) (1851) 2 Tay. & Bell. 300 ;   | (5) (1894) I. L. R. 22 Calc. 347. |
| 2 I. D. (O. S.) 577.              | (6) (1906) I. L. R. 29 All. 4.    |
| (7) (1897) I. L. R. 25 Calc. 254. |                                   |

The judgment of the Court (JENKINS C.J., HARRINGTON, STEPHEN. MOOKERJEE AND HOLMWOOD JJ.) was delivered by

MOOKERJEE J. This is an appeal by the first defendant in a suit for house rent. To appreciate the question of law which calls for decision, it is necessary to state briefly the undisputed facts. The house originally belonged to Kanailal Ghosh, who transferred it on the 10th October, 1893, to Dayamoyee Dasee and her brother's son Hara Chand Jalal. The purchasers, while in possession of the house, leased it to the first defendant on the 1st January, 1901. Shortly after, Dayamoyee Dasee died, on the 25th February, 1901. On the 20th July, 1908, Hara Chand Jalal transferred the house to the plaintiff, on the allegation that, upon the death of his father's sister, Dayamoyee Dasee, he had taken by inheritance her half share of the property and had thus become full owner thereof. On the 8th September, 1908, the plaintiff commenced the present suit for rent. Besides other defences not material at this stage, the first defendant resisted the claim on the plea that Dayamoyee Dasee was a prostitute, and that, consequently, Hara Chand Jalal, though her brother's son, was not her heir under the Hindu law. This contention has been overruled by both the Courts below. The evidence shows that Dayamoyee Dasee was a married woman, that after the death of her husband she became a prostitute, and that she was the mistress of one Bose. The house was apparently purchased by her with her own earnings, and, throughout this litigation, it has been assumed that it was her *stridhan* property. This assumption is in accord with the accepted view of the Bengal school of Hindu law, namely, that the term *stridhan* has no technical meaning or, in the words of Jimutavahana, "that alone is *stridhan* which she has power to give

1913

HIRALAL  
SINGHA  
v.  
TRIPURA  
CHARAN  
RAY.

1913  
 HIRALAL  
 SINGHA  
 v.  
 PRIPURA  
 CHARAN  
 RAY.

sell or use, independently of her husband's control." Dayabhaga, Chapter IV, Section I, paragraph 18: *Brij Indar Bahadur Singh v. Ranee Janki Koer* (1). The substantial question of law which, consequently, here requires examination may be formulated in these terms:

"Does the *stridhan* property of a Hindu woman who has adopted the life of a prostitute pass upon death to her brother's son as an heir under the Bengal school of Hindu law?"

It cannot be disputed that if a Hindu woman, governed by the Bengal school, is respectable, her *stridhan* property passes upon her death to her brother's son, in the absence of nearer heirs. This position is established by Jimutavahana in the Dayabhaga (Chapter IV, Section III, paragraph 37). Having pointed out in paragraphs 35 and 36 that the text of Vrihaspati mentioned in paragraph 31 relates merely to the right of succession, and is not declaratory of the order of inheritance, he observes that the text is "expressive of the strength of the fact (of the benefits conferred)" and then proceeds to develop the order of succession in paragraph 37 in the following terms:

"This then is the order of succession according to the various degrees of benefit to the owner of the property from the oblation of food at obsequies. In the first place, the husband's younger brother is entitled to the woman's property; for he is a *sapinda*, and presents oblations to her, to her husband and to three persons to whom oblations were to be offered by her husband. After him the son either of her husband's elder or of his younger brother, is heir to the separate property of his uncle's wife, for he is a *sapinda* and presents oblations to her, to her husband

and to two persons to whom oblations were to be offered by her husband. On failure of such, the sister's son, though he is not a *sapinda*, inherits the separate property left by his mother's sister, because he presents oblations to her and to three persons (her father and the rest) to whom oblations would have been offered by her son. In default of him, the son of her husband's sister (for it is reasonable, since the husband has a weaker claim than the son, that persons claiming under them should have similar relative precedence) is heir to the property of his uncle's wife, because he presents oblations to three persons to whom they were to be offered by her husband, and also presents oblations to her and to her husband. *On failure of him, the brother's son is the successor to his aunt's property, for he presents oblations to the father, to her grand-father, and to herself.* If there be no nephew, the husband of her daughter is heir to his mother-in-law's property, since he presents oblations to his mother-in-law and father-in-law."

The language used in this passage does not restrict its application to the *stridhan* property of a respectable woman only; the language is comprehensive enough to include *stridhan* property of a prostitute, who does not by the mere fact of lapse into prostitution cease to be a Hindu or to be subject to the rules of Hindu law. (Mitakshara on Yajñavalkya II, 290, Setlur's edition, page 1105; Girish Chandra Tarkalankar's Translation, page 121). The question therefore arises whether the rule laid down in the Dayabhaga, Chapter IV, Section III, paragraph 37, should be held inapplicable to the case of succession to the *stridhan* property of a prostitute, either because the reason on which the rule is founded ceases to be applicable in the case of a prostitute, or because, upon general principles of Hindu jurisprudence, the

1913  
HIRALAL  
SINGHA  
v.  
TRIPURA  
CHARAN  
RAY.

1913

HIRALAL  
SINGHA  
v.  
TRIPURA  
CHARAN  
RAY.

rule should be restricted in its application only to *stridhan* property of a respectable woman. In so far as the reason for the rule is concerned. Jimutavahana states that the brother's son is the successor to his aunt's property because he presents oblations to the father, to her grandfather and to herself. It is plain that the capacity to present oblations to the father and the grandfather of the aunt is not dependent upon her character; the claimant offers such oblations because they are the father and the grandfather of his own father. In so far, therefore, as capacity to present oblations to the father and the grandfather of the woman is concerned, the claimant possesses that qualification, whether or not his aunt is respectable. But in so far as capacity to present oblations to herself is concerned, it may be argued that when she lapses into prostitution the claimant loses that capacity. This, in fact, is the line of argument adopted by the appellant as based upon general principles of Hindu jurisprudence. The contention in essence is that when a Hindu woman lapses into prostitution, she is civilly dead, and that in the eye of the law the tie which connected her to any person through her father, mother, husband or children is completely severed; in other words, so far as her relations are concerned, the position is precisely the same as if she had suffered physical death. To establish this position, the appellant has been constrained to argue that when a woman lapses into prostitution she becomes an outcast, and that when a person has become an outcast, whether a man or a woman, the kinsmen must perform the same ceremonies as at the time of death.

Reference has been made to the following passages from the laws of Manu :

"The *sapindas* and *samanodakas* of an outcast must offer a libation of water to him, *as if he were*

*dead*, outside the village, on an inauspicious day in the evening, and in the presence of the relatives, officiating priests and teachers" (XI, 183).

"A female slave shall upset with her foot a pot filled with water, *as if it were for a dead person*; his *sapindas* as well as the *samanodakas* shall be impure for a day and a night" (XI, 184).

"But thenceforward, it shall be forbidden to converse with him, to sit with him, to give him a share of the inheritance, and to hold with him such intercourse as is usual among men" (XI, 185).

"And, if he be the eldest, his right of primogeniture shall be withheld, and the additional share due to the eldest son; and in his stead a younger brother excelling in virtue shall obtain the share of the eldest" (XI, 186). ("Sacred Books of the East," Volume 25, page 468.)

Before we determine the true import of this passage, we may observe that passages similar in scope and character are to be found in other institutional writers, amongst whom may be mentioned Gautama (XX, 4—7, S. B. E., Volume 2, page 278), Vasistha (XV, 12—16, S. B. E., Volume 14, page 77), Baudhayana (II, 1, 36, S. B. E., Volume 14, page 216) and Yajñavalkya (III, 295, Mandlik, 270). In each of these instances as in the case of the laws of Manu, the passages are followed by rules for the performance of penance, which serve to throw light upon the true significance of the directions for excommunication of outcasts. Thus, we have in the laws of Manu :

"But when he has performed his penance, they shall bathe with him in a holy pool and throw down a new pot, filled with water" (XI, 187).

"But he shall throw that pot into water, enter his house and perform, as before, all the duties incumbent on a relative" (XI, 188).

1913

HIRALAL  
SINGHA  
".  
TRIPURA  
CHAKRA  
RAY.

1913  
 HERALAL  
 SINGHA  
 v.  
 TRILOKA  
 CHARAN  
 RAY.

Of the like import are passages in Gautama (XX, 10—14, S. B. E., Volume 2, page 279), Vasistha (XV, 17—21, S. B. E., Volume 14, page 77), Baudhayana (II, 1, 36, S. B. E., Volume 14, page 216) and Yajnavalkya (III, 296, Mandik, page 270). Of equal significance is the following passage from the laws of Manu, which refers specially to female outcasts :

“ Let him follow the same rule in the case of female outcasts, but clothes, food and drink shall be given to them and they shall live close to the family house ” (XI, 189, S. B. E., Volume 25, page 169).

Upon this passage, three of the commentators of Manu, namely, Medhatithi, Sarbajna Narayan and Govindaraj, observe that provision is necessary for the residence and subsistence even of fallen women, so that they may have no temptation to proceed further in the paths of vice (Manu, edited by Mandlik, page 1439 and page 157, Appendix).

To the same effect is the following passage from the Institutes of Yajnavalkya :

“ This very ceremony is ordained in the case of degraded women. They should be given dwelling room in the vicinity of the house, provided with food and clothing, and be guarded ” (III, 297, Mandlik, page 270).

Vijñaneswara comments upon this passage that the fallen women should be allowed food just sufficient to sustain life and a piece of soiled cloth ; he adds that she should be reproved and admonished not to have intercourse with another man (Mitakshara Ed. by Setlur, page 1382). To the same effect is the comment of Apararka (Poona edition, page 1208).

It is fairly clear from the passages already quoted that the performance of ceremonies, similar to obsequial ceremonies, by the kindred of a person who is guilty of a heinous sin and has thereby become an

outcast, is indicative not of the fact that he is civilly dead but rather of the fact that his social rights have been suspended and such rights may be revived by the performance of the appropriate ceremonies and penances. This is supported by the express statement of Apararka in his Commentary on Yajñavalkya (III 294, Poona Edition, page 1205), that the outcast is, from the time of the performance of the ceremonies described, to be excluded from all social and religious performances and no one is to have intercourse with him in ordinary life. Apararka supports this view by quotations from the Institutes of Gautama, Vasistha, Sankha and Likhita. This is further confirmed by the fact that the social rights of the outcast may be revived upon the performance of the prescribed penances and ceremonies. This is elaborated in the Prayaschitta Viveka of Sulapani, in which heinous sins which cause degradation are divided into nine classes. For sins of each class penances, ceremonies and gifts are prescribed, and these vary in respect of different sins even in the same class, according to their gravity. A convenient summary of the different classes of sins and of the respective penances and ceremonies will be found in the Sabdakalpdruma, Art. *Prayaschitta*, Volume 3, pages 321—364. The view that an outcast is not civilly dead is further supported by the fact that the kindred of an outcast have to perform his obsequial ceremonies after his death. Thus, in the Chaturbarga Chintamani of Hemadri (Asiatic Society's edition. *Pariseskhanda*, Volume III, page 1661), it is stated that the obsequial ceremonies of an outcast, or of a person who has killed a cow or a Brahmin, are to be performed after the lapse of one year from his death. To the same effect is a passage in the Agnipurana, in which it is stated that salvation is effected of a person who has killed a

1913

HIRALAL  
SINGHA  
r.  
TRIPURA  
CHARAN  
RAY.



1913  
HIRALAL  
SINGHA  
v.  
TRIPURA  
CHARAN  
RAY.

Brahmin or a cow, or who has committed five heinous sins or who is guilty of ingratitude, if funeral oblations are offered for the benefit of such person at Gaya (Saddakalpadruma, Volume III, page 24, Art. *Patita*). In fact, Chapter XXII of the Pariseskhanda of the Chaturbarga Chintamani of Hemadri (Asiatic Society's edition, Volume III, page 1657) shows conclusively that obsequial ceremonies of an outcast should be performed by his kindred for the purpose of his salvation. To the same effect is the statement in the Institutes of Visnu (XXII, 57, S. B. E., Volume 7, page 93): "On the death day of an outcast, a female slave of his must upset a pot with water with her feet, saying, 'drink thou this.'" In fact, there is no foundation for the position suggested by the appellant, namely, that when a person becomes an outcast he is, in the contemplation of Hindu law, civilly dead for all purposes, and that the tie of relationship which connected him with his kindred is completely severed. The rites which are directed to be performed by his kindred when he becomes an outcast are intended to emphasise the complete exclusion of the outcast from all social and religious performances. This view is not opposed to that adopted by Raghunandan in the passage from his Institutes (Volume I, page 544) where he differentiates between the two-fold property of a heinous sin, namely, first, its capacity to cause the sinner to go to hell and, secondly, its capacity to cause exclusion from social intercourse; the former effect cannot be avoided when the sinful act is intentionally committed, but the second can be removed by the performance of penance and the sinner restored thereafter to social intercourse. Raghunandan does not hold that a person guilty of a heinous sin thereby cancels the tie of kindred which binds him to his relations. Stress, however, was laid upon a passage of the Dayabhaga

(I, 31) in which Jimutavahana observes that sons have not a right of ownership in the wealth of the living parents, but in the estates of both when deceased, and adds that this means "not mere demise, but also the state of a person degraded, gone into retirement, or the like." This passage, however, is clearly of no assistance to the appellant, because it merely asserts that right of property is annulled by degradation. That this is the true import of the passage is clear from the Dayatattwa of Raghunandan (Chapter I, paragraphs 9—11) where he points out with reference to the text of Narada quoted by Jimutavahana in the Dayabhaga (I, 32) and expounded in (I, 33), that sons are entitled to partition if the right of property of the parent be annulled by death or by degradation. This obviously refers to an entirely different problem. We are not now concerned with the question, whether a person who has committed a heinous sin and has become an outcast may not only be excluded from inheritance (Dayabhaga, Chapter V, paragraphs 6—13), but may also lose all rights of property, or whether such a comprehensive proposition can be reconciled with the view accepted by their Lordships of the Judicial Committee in the case of *Moniram Kolita v. Keri Kolutani* (1); nor need we determine whether the decision in *Sheonauth Rai v. Mussumaut Dayamyee, Chowdrain* (2), upon which much stress was laid by the appellant, can be treated as well founded on principle, in so far as it ruled that an adopted son forfeits his rights in the estate of his adoptive father by reason of intercourse with a Mahomedan woman, subjecting him to the penalty of irrevocable expulsion from caste. The question now under consideration is of an entirely different character; we are called upon to determine

1913

HIRALAL  
SINGHA  
v.  
TRIPURA  
CHARAN  
RAY.

(1) (1880) I. L. R. 5 Calc. 776 ; (2) (1814) 2 Mac. Sel. Rep. 137 ;  
L. R. 7 I. A. 115. 6 I. D. (O. S.) 462.

1913

HIRALAL  
SINGHA  
v.  
TRIPURA  
CHARAN  
RAY.

whether, where a woman lapses into prostitution, the tie of her relationship with her kindred is severed so as to render it impossible for the kindred to claim her estate by inheritance. As already stated, the texts do not support the theory that the tie is so severed. No doubt, there is the opinion of Mr. J. C. C. Sutherland, in his Synopsis of the Hindu law of Adoption appended to his translation of the Dattaka Mimansa and Dattaka Chandrika, to the effect that the mother of an infant may give him in adoption even during the lifetime of her husband who has permanently emigrated, entered a religious order or become an outcast, because, being civilly dead, he would be regarded as virtually deceased. No authority, however, is mentioned in support of this proposition, in so far as an outcast is concerned ; on the other hand, the passages in the Dattaka Mimansa (Section IV, paragraphs 9 and 10) and Dattaka Chandrika (Section I, paragraphs 7, 31, 32) mentioned, refer to cases where the husband has disappeared or has entered a religious order. But, even if there were any authority for the extension of the rule to a case where the husband has become an outcast, it might be defended possibly on the theory that the father, by his expulsion from caste, had been deprived of that right of guardianship over his child which alone would entitle him to assent to the adoption of the infant into a different family. In any event, Mr. Sutherland does not support his theory of civil death of an outcast by reference to any authorities, and it is significant that, in the preface to his work, he candidly admits that the synopsis possesses no intrinsic authority whatsoever, and that of the propositions it contains many are dubious and some may prove erroneous. We take it, therefore, that the appellant has failed to establish the theory that when a woman lapses into prostitution, the tie

of relationship which connects her with her kindred is thereby dissolved, so as to make it impossible for the kindred to claim her *stridhan* property by inheritance by reason of the relationship in which they stand to her. It is obvious that the adoption of such a theory would have rendered it necessary for the Hindu law-givers and commentators to provide a set of rules regulating succession to the property of a woman who has adopted the life of a prostitute. That prostitutes existed and were recognised in ancient Hindu society is clear from the passage of the *Mitakshara* to which reference has already been made (*Mitakshara*, Setlur's edition, page 1105; Girish Chandra Tarakalankar's translation, page 121). It is extremely improbable that, if the theory suggested by the appellants were well founded, the doctrine would be left to be inferred from casual references, and no provision would be made to regulate succession to the estate of a woman who has lapsed into prostitution. On the other hand, it may be conceded that cases of this description would rarely find their way into Courts; respectable people would deem it a degradation to acknowledge relationship with a fallen woman, much less would they be ready to claim property which represented the wages of her sin. It is remarkable that this feeling led Chanakaya to lay down in his *Arthashastra* that the estate of women of this class taken by the King by escheat in the absence of heirs should be given away by him in charity (*Arthashastra* of Kautilya, Mysore edition, page 161); but Chanakaya undoubtedly contemplated that the estate would not reach the hands of the King till there was a complete failure of heirs. The same idea pervades a passage in the *Vatsyayan Sutra* (Jaipore edition, page 347) where it is stated that the wealth of a fallen woman may be taken in gift by a Brahmin for religious purposes, if it does not reach

1913

HIRALAL  
SINGHA  
2.  
TRIPURA  
CHAKRAN  
RAY.

1913  
—  
HIMALAL  
SINGHA  
v.  
TRIPURA  
CHARAN  
RAY.

his hands directly. But the position is entirely different when the kindred of a woman who has lapsed into prostitution lay claim to her estate upon her death. The mere fact of the degraded life she led did not sever the tie of relationship between her and her kindred, and though she might have been disqualified as an heiress, there is no reason why her undegraded relations should not, if they are prepared to put forward the claim, take her *stridhan* estate by right of inheritance.

It has been earnestly contended, however, on behalf of the appellant, that this view is directly opposed to what has been regarded as settled law in the Courts of this Province since 1846, and should on that ground alone be repudiated. We are clearly of opinion that this contention ought not to prevail. It is true that in the case of *Tara Munnee Dossea v. Motee Buneancee* (1), it was held that the tie of relationship is severed between a married and respectable daughter and her mother when the latter adopts the life of a prostitute. This decision was founded upon an opinion of the Pandit of the Sudder Court which is supported neither by any statement of reasons nor by any reference to the original texts. On the other hand, in the *Matsya Purana*, as quoted in the *Sabdakalpadruma*, Volume III, page 24, it is expressly stated that there may be fallen persons who cannot be forsaken and, as an illustration, it is said that although elder relations who may have lapsed into prostitution, or have otherwise fallen, should be abandoned, yet the mother should never be so treated, and the reason assigned for this preferential treatment is that the mother who has borne and bred the child is the greatest of all relations. It is unfortunate that this decision of the Sudder Court, based

(1) (1846) 7 Mac. Sel. Rep. 325 ; 8 I. D. (O. S.) 247.

on such doubtful authority, should have been subsequently accepted without question: *In the goods of Kamineymoney Bewah* (1), *Sarna Moyee Bewa v. Secretary of State* (2). But the position was doubted in *Bhuthath Mondol v. Secretary of State* (3), *Sundari Dossee v. Nemye Charan Daw* (4) *Tripura Charan Bannerjee v. Harinati Dass* (5) and in the referring order in the case of *Chatoo Kurmi v. Raiaram Tewari* (6). It is clear, therefore, that the course of decisions in this Court on the point since 1846 has not been uniform: *Haril Lal Singha v. Rup Maniori Burmoni* (7). In the Madras High Court, the decision in *Tara Munnee Dossea v. Motee Buneanee* (8) was followed in *Sivasangu v. Minal* (9), which was accepted as good law in *Narasanna v. Gangu* (10). But in the later case of *Subbaraya Pillai v. Ramasami Pillai* (11), the learned Judges of the Madras High Court expressly dissented from the proposition that degradation on account of unchastity entails, in the eye of the law, complete cessation of the tie of kindred between the fallen woman and the members of her natural family, or between her and the members of her husband's family, observing that, in their opinion, the circumstance that in general it is open to an outcast to resume his former position after expiation (*Viramitrodaya*, Chapter I, Section 52) strongly pointed to the view that degradation had the effect of rendering dormant at best the tie of kindred. (See *Laws of Manu*, XI, 60, 177-178, which prescribe the penance for the expiation of an

1913

HIRALAL  
SINGHA  
P.  
TRIPURA  
CHARAN  
RAY.

(1) (1894) I. L. R. 21 Cal. 697.

(6) (1909) 11 C. L. J. 124.

(2) (1897) I. L. R. 25 Cal. 254.

(7) (1912) 17 C. L. J. 459.

(3) (1906) 10 C. W. N. 1085.

(8) (1846) 7 Mic. Sel. Rep. 325.

(4) (1907) 6 C. L. J. 372.

(9) (1889) I. L. R. 12 Mad. 277.

(5) (1911) I. L. R. 38 Cal. 493.

(10) (1889) I. L. R. 13 Mad. 133.

(11) (1899) I. L. R. 23 Mad. 171.

1913  
 HUKMAL  
 SINGHA  
 v.  
 TRIPURA  
 CHARAN  
 RAY.

adulterous woman; it is lighter or heavier according to the caste of the male offender: S. B. E., Volume 25, page 467; see also Vasistha, XXI, 8, 12—13, S. B. E., Volume 11, page 112; Vishnu, LIII, 8, S. B. E., Volume 7, page 174). The same view has been adopted by the Allahabad High Court in the cases *Bisheshur v. Mata Gholam* (1) and *Narain Das v. Tirlak Tiwari* (2). In some of the cases, again, a question of competition between a degraded and an undegraded person has arisen for consideration, and this, in fact, was the real question before the Sudder Court in *Tara Munnee Dossea v. Motee Buneanee* (3); so also was the question directly in issue in *Sivasangu v. Minal* (4), and *Narasanna v. Gangu* (5). That question of preferential right does not require consideration in the case before us, and we need not consequently determine whether, as stated in *Subbaraya Pillai v. Ramasami Pillai* (6), the claim of the degraded heir may be preferred to that of the undegraded heir of equal degree on any "equitable principle."

The extent to which divergence of judicial opinion is possible in cases of this description is well indicated by the decision in *Ramprasad v. Mt. Subu Bai* (7). In that case, one Radha was legally married to one Mati Lal, but many years before her death she abandoned her husband, adopted the life of a prostitute and lived as the mistress of Raibhangi. Upon her death, her property, which had been received by her from her paramour, was claimed, on the one hand, by the daughter of her sister, and on the other, by a son of the brother of her husband. The claimants were both of them undegraded, but the defendant, the son of the

(1) (1870) 2 All. H. C. R. 300.

(2) (1906) I. L. R. 29 All. 4.

(3) (1846) 7 Mac. Sel. Rep. 325;  
 8 I. D. (O. S.) 347.

(4) (1889) I. L. R. 12 Mad. 277.

(5) (1889) I. L. R. 13 Mad. 133.

(6) (1899) I. L. R. 23 Mad. 171.

(7) (1908) 4 Nag. L. R. 31.

husband's brother, resisted the claim of the plaintiff, the sister's daughter, on the ground that as a respectable woman she was not entitled to succeed by inheritance to the estate of her mother's sister, who had become degraded by reason of lifelong prostitution. The Judicial Commissioner declined to accept the contention that when a woman has lapsed into prostitution she becomes civilly dead, with the result that the tie of relationship which connects her to her kindred is completely severed. He held that no tie of blood can be destroyed by unchastity, whatever personal disability may be imposed by express provisions of the law upon the person who has become unchaste; consequently, where inheritance is a right arising out of consanguinity, the unchastity or degradation of the *propositus* or *proposita*, as the case may be, will not divert the descent of property, save where there is an express provision. In support of this view, reliance was placed upon *Musammatt Ganga Jati v. Ghasita* (1), *Advyapa v. Rudrava* (2), and *Kojiyadu v. Lakshmi* (3), and doubt was expressed as to the view adopted in *Ramnath Tolapattro v. Durga Sundari Debi* (4), *Ramananda v. Rai Kishori Barmani* (5) and *Sundari Letani v. Pitambari Letani* (6). The learned Judge, however, proceeded to hold that prostitution on the part of the wife, during the lifetime of her husband, had operated to dissolve the marriage tie between them, and that they had ceased to be husband and wife, with the result that upon her death neither her husband nor any persons claiming through him could take by inheritance her *stridhan* property. This view, it will be observed, is founded upon the theory that kindredship by blood

1913  
HIRALAL  
SINGHA  
v.  
TRIPURA  
CHABAN  
RAY.

(1) (1875) I. L. R. 1 All. 46.

(4) (1898) I. L. R. 4 Calc. 550.

(2) (1879) I. L. R. 4 Bom. 104.

(5) (1894) I. L. R. 22 Calc. 347.

(3) (1881) I. L. R. 5 Mad. 149.

(6) (1905) I. L. R. 32 Calc. 871.



1913  
HIRAJAL  
SINGHA  
v.  
TRIPURA  
CHAMAN  
RAY.

stand, in the matter of dissolubility, upon an entirely different footing from the tie of marriage, which, according to the learned Judge, is essentially and necessarily a contract though clothed with sacrament. The learned Judge very emphatically expressed the opinion that it would be anomalous to hold that a married woman who has lapsed into prostitution during the lifetime of her husband is still a wife, but that she has not a single conjugal right or claim attached to her wifehood, that her husband may think her as dead in respect of all rights given to her and all obligations imposed on him by the marriage, such as maintenance, protection, society, and inheritance from him, while he retains all his rights as a husband, including that of succession to her separate estate. From this point of view, it was not difficult to reach the conclusion that where a Brahmin husband totally and finally abandons his wife on the ground of unchastity, inexpressible or unexpiated, so as to destroy all her present and future claims on him and his inheritance, the relationship of marriage is dissolved, so far as it sustains the civil rights and obligations of husband and wife *inter se*. The same view was adopted in *Moharani v. Thakur Proshad* (1), where it was ruled that property acquired by an unchaste widow by prostitution cannot strictly be called her *stridhan* in the technical sense of a wife's or a married woman's property, and that property so acquired goes to her illegitimate child and not to the members of her husband's family, upon whom the widow had no claims whatever after she began to live with her paramour. It is not necessary, for our present purpose, to examine the question, by no means free from difficulty, as to the true nature of Hindu marriage, and the still more difficult question,

(1) (1911) 14 Oudh Cases 234.

whether the marriage tie is dissolved and the relationship of husband and wife annulled by the lapse of the wife into prostitution. Nor is it necessary to examine the further question whether, assuming the marriage tie to be incapable of dissolution even by reason of prostitution on the part of the wife, the sister's daughter or husband's brother's son would be the preferential heir to property acquired by her as a prostitute. The learned Judicial Commissioner held that no Hindu law-giver, with his high ideals of female chastity and of spiritual affinity between heir and *propositus*, would place the husband in the list of heirs to the acquisitions of his fallen wife by and during her degradation. In this view, the Judicial Commissioner held that the plaintiff, who was governed by the Bombay school of Hindu law, was entitled to what was described in *Manilal Rewadat v. Bai Rewa* (1), as *stridhan* "improper" of her mother's sister, on the ground that the defendant as the son of her husband's brother was either no heir at all, or if an heir was bound to be postponed to the plaintiff.

Upon an examination of the original texts and upon a review of the judicial decisions on the subject, we hold that the mere fact that a Hindu woman has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood, and, that consequently, the *stridhan* property of a Hindu woman who has adopted the life of a prostitute passes upon her death, in the absence of nearer heirs, to her brother's son as an heir under the Bengal school of Hindu law.

It is conceded that, as held by the Division Bench, the plaintiff cannot successfully claim the arrears of rent purchased by him. The decree of the Court below must consequently be modified to this extent.

1913

HIRALAL  
SINGHA  
PL.  
TRIPURA  
CHAMAN  
RAY.

1913  
 HIRALAL  
 SINGHA  
 v.  
 TRIPURA  
 RAY.

In this view, the decree of the Subordinate Judge must be affirmed, subject to the variation mentioned. The respondent will have his costs of the hearing, as well before the Division Bench as before the Full Bench.

S. M.

### CIVIL RULE.

*Before Mookerjee and Beachcroft JJ.*

1913  
 March 4.

ANAND MAHANTI

v.

GANESII MAHESWAR.\*

*Receiver—Insolvency—Jatri or "Pilgrim business," profits from—Priest, office of—Provincial Insolvency Act (III of 1907), ss. 2(1) (g), 18, 20(c), 40(1), 44, 47—"Business"—"Trade."*

Where, pending an appeal to the High Court by a creditor in insolvency against a conditional order of discharge in favour of the insolvent who was a *panda* or priest attached to the temple of Jagannath at Puri, an application was made for the appointment of a receiver in respect of the business of the insolvent, which consisted in receiving pilgrims, housing them, feeding them, looking after their comfort, and accompanying them to the temple of Jagannath, in return for a fee from the said pilgrims in the nature of a voluntary payment, the object of the creditor being not to stop the business but to carry it on, so that the insolvent priest may be constantly attended by the receiver, who may take possession of all his earnings :

*Held*, that what the priest did for the pilgrims could not appropriately be described as "business" within the meaning of clause (c) of s. 20 of the Provincial Insolvency Act; and that the exercise of his calling by the insolvent, under the circumstances stated, could not be deemed a "trade" within the meaning of subs. (1) of s. 40 of the Provincial Insolvency Act.

\* Civil Rule, No. 173 of 1913, for the appointment of a Receiver in the matter of appeal from Original Order No. 648 of 1912.

*Held*, also, that ordinarily the business of the insolvent might be carried on by the receiver, not with a view to profit, but only in so far as might be necessary for the beneficial winding up of the same.

*Ex parte Emmanuel* (1) followed.

The difference between a receiver and a manager explained.

*In re Manchester and Milford Railway Co.* (2), *Moss Steamship Co. v. Whimsey* (3), *In re Leas Hotel* (4), *Boehm v. Goodall* (5), and *In re Newdigate Colliery, Ltd.* (6), referred to.

THE facts are as follows. The opposite party, a *jatri pandit*, belonged to a family of hereditary priests attached to the temple of Jagannath, at Puri, and he incurred debts amounting to nearly a lakh of rupees, his assets being only about Rs. 20,000. On the 5th April, 1912, he applied to the District Judge of Cuttack to be adjudicated an insolvent, and an adjudication order was made on 20th December, 1910. Subsequently on 1st April, 1912, the insolvent applied for a conditional discharge under section 44 of the Provincial Insolvency Act, which was made on 8th October, 1912, and against this order one of the creditors preferred an appeal to the High Court. In the meantime, the Nazir of the Court below was directed to sell the property of the insolvent and to distribute the sale-proceeds amongst his creditors, the insolvent being also directed to bring the surplus of his after-acquired property and earnings into Court, after keeping an annual sum of Rs. 540 for the support of himself and his family. During the pendency of these proceedings the District Judge of Cuttack had appointed several receivers from time to time who had carried on this "pilgrim business" at a loss, having had to incur fresh debts for that purpose. On the 25th November, 1911, the learned District Judge, with regard to the

1913  
ANAND  
MAHANTI  
v.  
GANESH  
MAHESWAR.

(1) (1881) 17 Ch. D. 35, 39.

(2) (1880) 14 Ch. D. 645, 653.

(3) [1912] A. C. 254.

(4) [1902] 1 Ch. 332, 333.

(5) [1911] 1 Ch. 155, 158.

(6) [1912] 1 Ch. 468, 472.

1913  
ANAND  
MAHANTI  
v.  
GANESH  
MAHESWAR.

appointment of a new receiver, had directed that the insolvent himself, and not the receiver, should conduct his own "pilgrim business," but make over to the receiver all his earnings over and above what was necessary for his support.

In view of the income and profits expected from the large influx of pilgrims at the *Dole Jatra* festival, the creditor, appellant, applied to the High Court for the appointment of a trustworthy and capable receiver.

*Babu Susil Madhav Mallik* and *Babu Charu Chandra Biswas*, for the petitioners. This is eminently a fit case for the appointment of a receiver. The insolvent's assets are said to be about Rs. 20,000, but his total liabilities come up to about a lakh of rupees, of which nearly half has been proved by me, and though the adjudication was made as far back as December, 1910, none of the creditors has up to now got a single pice. We say the insolvent carries on a large and profitable business as a *panda* of the temple of Puri, and with due supervision and control it may be made to bring a substantial income to the estate for the benefit of the creditors. It is quite practicable to have a receiver of the "pilgrim business", provided a suitable person is appointed. As a matter of fact several receivers were appointed from time to time in the lower Court in respect of the insolvent's business, but the reason that they were not successful is that they were all unfamiliar with *jatri* business. If desired, the insolvent himself may be permitted to carry on the priestly part of the duties, leaving the collections and cash transactions solely to the receiver, who will have control over the *khata* books of the *panda*, will keep and check the accounts, and altogether exercise a

general supervision, with a view to see that no loss is occasioned to the business by any wilful default or negligence on the part of the insolvent in securing or entertaining the pilgrims. Unless a strict and vigilant check is exercised over his dealings, there is every chance of his misappropriating the earnings, and from the nature of things, if he does so, the chances of detection are almost nil.

Under section 18 of the Provincial Insolvency Act, the Court may, at the time of adjudication, *or at any time afterwards*, appoint a receiver for the property of the insolvent, and the "pilgrim business" is property within the meaning of this section. "Court" is defined in section 2 (1) (g) as the Court exercising jurisdiction under the Act, and would therefore include the High Court as a Court of appeal by virtue of section 47: see *Abdul Razah v. Basiruddin Ahmed* (1). This is also a case where your Lordships will exercise your inherent jurisdiction under section 151 of the Civil Procedure Code for the protection of the interests of the creditors.

*Babu Suresh Chandra Chakrabarty*, for the opposite party. No case has been made out for the appointment of a receiver. Several receivers were appointed before, but none of them benefited the estate. Furthermore, since the order of discharge now under appeal was made, the Nazir of the Court below has been directed to sell the property of the insolvent, leaving only that to him which is necessary for his livelihood, and to distribute the sale-proceeds amongst the creditors. In the order of discharge, again, the insolvent has been directed to bring the surplus of his after-acquired property and earnings to Court. I submit the creditors are not prejudiced. The estate is still practically in the hands of the Court.

(1) (1910) 14 C. W. N. 586.

1913  
ANAND  
MAHANTI  
P.  
GANESH  
MAHESWAR.

1913  
ANAND  
MAHANTI  
v.  
GANESH  
MAHESWAR.

Besides, under section 20(c) of the Provincial Insolvency Act the receiver may only carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same. The petitioner does not ask for winding up.

*Babu Susil Madhav Mallik*, in reply. The provisions of section 20 are not exhaustive. Clause (c) does not indicate that the receiver may not carry on the business, except for winding up. The powers of the receiver are wider than those mentioned in section 20. Your Lordships may, if necessary, make a joint order under sections 18 and 40 by associating the insolvent with the receiver in the superintendence and management of his business.

MOOKERJEE AND BEACHCROFT JJ. We are invited by the petitioner in this Rule to make an order of a novel character. The opposite party belongs to a family of hereditary priests attached to the temple of Jagannath. He applied to be adjudicated an insolvent under the Provincial Insolvency Act, 1907. An adjudication order was made, and subsequently, under section 44, a conditional order of discharge was passed. Against that order an appeal has been preferred to this Court by the creditor. The latter now applies for the appointment of a receiver to take charge of what is described as "pilgrim business", during the pendency of the appeal. The question arises, whether what is described as "pilgrim business" is a business of which the Court will appoint a receiver. It has been stated to us that the insolvent, as a hereditary priest, receives pilgrims, houses them, feeds them, looks after their comfort and accompanies them to the temple of Jagannath; for these services he receives from the pilgrims a fee, which is in the nature of a voluntary payment. It has been asserted on behalf

of the creditor that the insolvent earns a considerable sum of money in this way, and that a receiver should be appointed, if not to look after the conduct of this business, at any rate to take possession of the money as soon as it is earned. On behalf of the insolvent, it has been contended, on the other hand, that under section 20, clause (c) of the Provincial Insolvency Act, the receiver may, by leave of the Court, carry on business of the insolvent so far as may be necessary for the beneficial winding up of the same, but that the receiver should not carry on the business in expectation of profit. This contention is well founded, and is supported by the decision in *Ex parte Emmanuel* (1), where it was pointed out that ordinarily the business of the insolvent may be carried on by the receiver, not with a view to profit, but only in so far as may be necessary for the beneficial winding up of the same. The principle is well settled that the Courts are generally averse to assuming the management of a business, except as incidental to the object of the proceedings and for the purpose of closing it up and dividing the assets. In this connection, reference may be made to *In re Manchester and Milford Railway Co.* (2), where Jessel M.R. explains the distinction between a receiver and a manager: see also *Moss Steamship Co. v. Whinney* (3), *In re Leas Hotel Co.* (4), *Boehm v. Goodall* (5), *In re Newdigate Colliery* (6).

In the case before us, the object of the creditor is, it is admitted, not to stop the business, but to carry it on. There is a further difficulty in the way of the appellant; what the priest does for the pilgrims cannot appropriately be described as "business" within the meaning of clause (c) of section 20. The

1913  
ANAND  
MAHANTI  
v.  
GANESH  
MAHESWAR.

(1) (1881) 17 Ch. D. 35, 39.

(2) (1880) 14 Ch. D. 645, 653.

(3) [1912] A. C. 254.

(4) [1902] 1 Ch. 332, 333.

(5) [1911] 1 Ch. 155, 158.

(6) [1912] 1 Ch. 468, 472.



1913  
ANAND  
MAHANTI  
v.  
GANESH  
MAHESWAR.

object of the appellant is that the insolvent should act as a priest, and that he may be constantly attended by the receiver, so that the latter may take possession of all his earnings; this clearly is not contemplated by section 20. Our attention, however, has been drawn to sub-section (1) of section 40 of the Provincial Insolvency Act, which provides that the Court may appoint the insolvent himself to superintend the management of his property or of any part thereof, or to carry on his trade, if any, for the benefit of the creditor. This is plainly of no assistance to the appellant, for the exercise of his calling by the insolvent, under the circumstances stated, cannot be deemed a "trade" within the meaning of sub-section (1) of section 40; besides, the creditor seeks that an outsider, and not the insolvent himself, should be appointed to carry on this business. We are of opinion that this order the creditor is not entitled to obtain.

The result is that the Rule is discharged, but there will be no order for costs.

G. S.

*Rule discharged.*

**APPELLATE CIVIL.***Before Jenkins C.J. and Mullick J.*

CHATRAPAT SINGH DUGAR

1913

March 11.

v.

KHARAG SINGH LACHMIRAM.\*

*Appeal to Privy Council—Application for leave to appeal—Whether appeal to Privy Council lies in cases under the Provincial Insolvency Act—Right of appeal to Privy Council, on what it rests—Letters Patent (of 1865), cl. 39—Civil Procedure Code (Act V of 1908), ss. 109, 110, and O. XLV, r. 3—Provincial Insolvency Act (III of 1907), ss. 46, 47.*

The right of appeal from the High Court to the Privy Council rests on cl. 39 of the Letters Patent (of 1865) read with ss. 109 and 110 and O. XLV, r. 3 of the Civil Procedure Code.

The Provincial Insolvency Act does not interfere with any right of appeal to the Privy Council that may otherwise exist.

*Bombay Burmah Trading Corporation, Ltd. v. Donaji Cursetji Shroff* (1) referred to.

Where an application for insolvency was dismissed under s. 15 of the Provincial Insolvency Act and an appeal was also dismissed in the High Court under O. XLI, r. 11 :—

*Held*, that an appeal to the Privy Council was competent if the matter was appealable in other ways.

APPLICATION for leave to appeal to His Majesty in Council by Chatrapat Singh, a petitioner for insolvency.

On the 21st May 1909, one Chatrapat Singh Dugar filed an application for insolvency in the Court of the District Judge of Murshidabad under section 5 of the Provincial Insolvency Act. Various creditors

\* Application for leave to appeal to His Majesty in Council, No. 23 of 1912.

1913  
 CHATRAPAT  
 SINGH  
 DUGAR  
 v.  
 KHARAG  
 SINGH  
 LACHMITRAM.

appeared to contest the matter. They contended, *inter alia*, that the application was not *bona fide* and fit to be dismissed, as it was really meant to keep in abeyance the process of the Court in other matters. It was submitted on behalf of the petitioner that the question whether he had or had not committed acts of bad faith was to be determined by the Court, not at this preliminary stage, but at the final stage when application would be made for an order of discharge, and it was further submitted that the requirements of section 6 of the Provincial Insolvency Act having been fulfilled, the order of adjudication should be passed under section 16 of the said Act. The District Judge, however, overruled the contention of the petitioner and dismissed the application under section 15 of the Insolvency Act, holding that the application was an abuse of the process of the Court. No evidence was adduced on behalf of any party before the District Judge. Thereupon, the petitioner preferred an appeal to the High Court, and at the hearing under O. XLI, r. 11 of the Civil Procedure Code it was urged among other grounds that the District Judge of Murshidabad had erred in law in determining at the preliminary stage whether any act of bad faith had been committed and in dismissing the application under section 15 of the Provincial Insolvency Act, and that an order for adjudication under section 16 of the Act should have been passed instead. The appeal was dismissed. The petitioner then preferred an application for a review of the order passed under O. XLI, r. 11. The application for review was rejected. Thereupon, the petitioner filed this application for leave to appeal to His Majesty in Council.

*Dr. Rashbehary Ghose* (with him *Babu Hemendra Nath Sen*), for the appellant. The only sections that

are necessary to be considered are sections 6, 15, 16, 44(i) and 47 of the Provincial Insolvency Act. The question whether an applicant is guilty of bad faith can be considered only at the time of discharge: *Sheikh Samiruddin v. Srimati Kadumoyi D si* (1), *Uday Chand Maiti v. Ram Kumar Khara* (2), *Kali Kumar Das v. Gopi Krishna Ray* (3), *Girwar-dhari v. Jai Narain* (4) and *Jeer Chetti v. Ranga-sawmi Chetti* (5). As to what is abuse of Court's process, see *Ex parte Painter* (6). Where does the question of abuse of Court's process come in at this stage? The Court must declare if the conditions mentioned in section 6 are complied with. The question is concluded by authority, if authority were needed, for the Act is clear. The reference to Woodroffe J.'s judgment in an insolvency matter in the Original Side of this Court in which my client was concerned was irrelevant. As to whether an appeal to the Privy Council is competent at this stage, I submit an appeal lies under the Civil Procedure Code or clause 39 of the Letters Patent. The Rangoon Land Acquisition Case, *Rangoon Botatouny Company, Ltd. v. The Collector, Rangoon* (7), is clearly distinguishable. Under the Land Acquisition Act only one appeal is allowed.

[JENKINS C.J. That Act is distinguishable.]

The point is fully discussed in *The Special Officer, Salsette Building Sites v. Dasabhai Bezanji Motiwala* (8). In *Bombay Burmah Trading Corporation, Ltd. v. Dorabji Cursetji Shroff* (9) the application was under the Code, I think. If you see the arguments of

1913  
 CHATRAPAT  
 SINGH  
 DUGAR  
 v.  
 KHARAG  
 SINGH  
 LACHMIRAM.

(1) (1910) 15 C. W. N. 244.

(2) (1910) 15 C. W. N. 213.

(3) (1911) 15 C. W. N. 990.

(4) (1910) I. L. R. 32 All. 645.

(5) (1911) 22 Mad. L. J. 52.

(6) (1894) [1895] 1 Q. B. 85.

(7) (1912) I. L. R. 40 Calc. 21 ;

L. R. 39 I. A. 197.

(8) (1913) 17 C. W. N. 421.

(9) (1903) I. L. R. 27 Bom. 415.

1913  
 CHATRAPAT  
 SINGH  
 DEGAR  
 C.  
 KHARAG  
 SINGH  
 LACHMIRAM.

Mr. Branson and Mr. Lowndes in the last mentioned case, you will find the point fully discussed.

It would be a very serious thing if no appeal lay under the Provincial Insolvency Act. Then no appeal would lie under the Bengal Tenancy Act, Probate and Administration Act, and Companies Act.

See *In the Matter of the Petition of Feda Hossein* (1). Before 1874 concurrent findings of fact did not of itself debar appeal to His Majesty. In this case Mr. Kennedy contended that the section taking away the right of appeal in such cases was *ultra vires*.

Here all that can be said is that the powers of the High Court under the Letters Patent are wider, and that they are not inconsistent with the Code. The case of *Hurriah Chunder Chowdhry v. Kalisunderi Debi* (2) discusses a question similar to the present one.

[JENKINS C.J. The difficulty is that in the Insolvency Act only certain sections are made applicable to the Code.]

See Provincial Insolvency Act, s. 47.

*Babu Ramchandra Majumdar* (with him *Babu Saratkumar Mitra* and *Babu Harihar Prasad Sing*), for the respondents. The Code has no application to this case—particularly that portion of the Code which deals with the Privy Council: see sections 46 and 47 of the Provincial Insolvency Act. The appeal to the High Court is contemplated by clause (2) of section 46. As soon as that is done, the force of the section is exhausted. Save and except section 46, there is no provision for High Court interfering. Under section 47 only a limited application of the Code is allowed. When an appeal is preferred, the procedure is to be as laid down in the Code. The force of the Insolvency

(1) (1876) I. L. R. 1 Cal. 431.      (2) (1882) I. L. R. 9 Cal. 482 ;  
 L. R. 10 I. A. 4.

Act continues only so long a case is pending in the lower Court, and the force of the Code so long the appeal is pending in the High Court. Section 141 of the Code is not applicable and cannot be imported to section 46 of the Insolvency Act.

\* In *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon* (1), it was held that no appeal lay.

[JENKINS C.J. But an award is not order or decree under the Code or Letters Patent.]

But the Privy Council did not proceed on that line. They said the Code was not applicable.

Whether any authority but the Privy Council can give the right to appeal to His Majesty is a wide question. In this case section 47 of the Provincial Insolvency Act would have been useless, if an appeal to the Privy Council were competent.

[JENKINS C.J. But how can you distinguish *Bombay Burmah Trading Corporation, Ltd. v. Dorabji Cursetji Shroff* (2)?]

But in the Companies Act there is no provision that the Code is applicable only to certain sections of that Act. Mookerjee J. in *Uday Chand Maiti v. Ram Kumar Khara* (3) says that most of the provisions of the Provincial Insolvency Act are largely drawn from English law: see Halsbury's Laws of England, Vol II, p. 467, as to the powers of a Court to decline making an order on a petition for insolvency when it finds it to be an abuse of the process of Court.

The appellant here evidently did not attack the findings of fact.

*Dr. Ghose*, in reply, on the question of abuse of Court's process, referred to sections 6, 15 and 17 of the Provincial Insolvency Act, and submitted that he was informed by his junior that in the hearing

1913  
 CHATRAPAT  
 SINGH  
 DUGAR  
 P.  
 KHARAG  
 SINGH  
 LACHMIRAM.

(1) (1912) I. L. R. 40 Calc. 21 ;      (2) (1903) I. L. R. 27 Bom. 415.  
 L. R. 39 I. A. 197.      (3) (1910) 15 C. W. N. 213.

1913

CHATRAPAT  
SINGH  
DUGAR  
v.  
KHARAG  
SINGH  
LACHMIRAM.

under O. XLI, r. 11, the Judges were asked to consider the merits of the case, but declined.

JENKINS C.J. This is an application for leave to appeal to His Majesty in Council.

The applicant presented a petition under the Provincial Insolvency Act praying to be adjudged an insolvent, but his petition was dismissed. From this order of dismissal an appeal was preferred to the High Court, but his appeal was dismissed under O. XLI, r. 11. There was an application for review, but that was refused, and it is in these circumstances that the present application has been made for leave to appeal to His Majesty in Council.

The first point we have to consider is whether an appeal lies.

The right of appeal from the High Court to the Privy Council rests on clause 39 of the Letters Patent, and this is elaborated in the Code of Civil Procedure. Section 109 of the Code provides that "subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction; (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and (c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council."

Section 110 deals with cases mentioned in clauses (a) and (b) of section 109, and provides that in those cases the amount or value of the subject-matter must be as therein stated, and, where the decree or final

order affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

The procedure as laid down in O. XLV, r. 3 of that order provides that "every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council."

In the present case we are told that the assets are expected to be five lakhs or so, and the creditors represent an indebtedness very much in excess of that. This is accepted on both sides as substantially representing the actual state of affairs.

It is said that we have no power to grant leave, because no provision for appeal to Privy Council is contained in the Insolvency Act, and it is urged that sections 46 and 47 of that Act, if anything, negative this right of appeal. But I do not so read the Insolvency Act. In my opinion, by that Act there was no intention to interfere with any right of appeal to the Privy Council that might otherwise exist, and this is a case which comes clearly within the provisions of the Letters Patent and of section 109 of the Code. The only question is whether this is a case which can properly be certified to be a fit one for appeal to His Majesty in Council: *The Bombay Burmah Trading Corporation, Ltd. v. Dorabji Cursetji Shroff* (1). It has been suggested before us on the part of the respondents that there has been an abuse of the process of the Court, and the learned Judge of the District Court so held. But there is no express decision by the High Court to that effect, because the appeal was dismissed under O. XLI, r. 11, and where

1913

CHATHRAPAT  
SINGH  
DUGAR  
v.KHARAG  
SINGH  
LACHMIRAM.

JENKINS C.J.



1913  
 CHATRAPAT  
 SINGH  
 DUGAR  
 v.  
 KHARAG  
 SINGH  
 LACHMIRAM.  
 JENKINS C.J.

this is done the evidence is not considered but merely the judgment under appeal. More than that, we are assured by the learned pleader who appears for the applicant and who sought to have the appeal to the High Court admitted, that this is what actually occurred in this case. Therefore, it cannot be said that there is any concurrent finding that there was an abuse of the process of the Court.

Moreover, I think this is a case where a substantial question of law arises as to whether it was within the competence of the District Judge to dismiss the application as he did, having regard to the provisions of section 15 of the Provincial Insolvency Act. In my opinion, therefore, this is a case which comes within section 109 (c) of the Code of Civil Procedure, and we ought therefore to certify that this case is a fit one for appeal to His Majesty in Council under section 109(c).

Let a certificate be issued accordingly.

MULLICK J. concurred.

S. M.

*Certificate granted.*

## CRIMINAL REFERENCE.

*Before Sharfuddin and Richardson JJ.*

EMPEROR

1913

v.

March 11.

HARKUMAR BARMAN ROY\*

*Jury, trial by—Verdict by casting lots—Admissibility of the evidence of jurors and of admissions by jurors as to the mode of arriving at the verdict—Evidence of other persons in proof of the same, admissibility of.*

The sworn statements of jurors, and evidence of admissions by them, as to the mode in which their verdict had been arrived at, are inadmissible. But the evidence of other persons as to the same is receivable.

*Owen v. Wurburton* (1), *Straker v. Graham* (2), *Burgess v. Langley* (3) and *Queen v. Murphy* (4) referred to.

The evidence of a witness that he saw one of the jurors put some pieces of crumpled up paper in his *alwan*, shake them up and take them out, is not sufficient to prove that the verdict was arrived at by casting lots.

THE accused was tried by the Additional Sessions Judge of Mymensingh, with a jury, on a charge under section 302 of the Penal Code, found guilty by their unanimous verdict and sentenced to death.

It appeared that one Ganga Moyi Dasya was a tenant and near neighbour of the appellant, and had been involved in dispute with him as to her occupation of a certain *bari*. On the 3rd September, 1912, she went to sleep on a mat on the floor of her south *ghar*, and it was alleged by the prosecution that the appellant entered the room and cut her neck with a *dāo*. Bagala Moyi Dasya, her daughter-in-law, came out of

\* Criminal Reference, No. 33 of 1912, by M. C. Ghosh, Additional Sessions Judge of Mymensingh, dated Dec. 10, 1912.

(1) (1805) 1 B. & P. 326.

(3) (1843) 5 M. & G. 722.

(2) (1839) 4 M. & W. 721.

(4) (1869) L. R. 2 P. C. 535.

1913  
 EMPEROR  
 v.  
 HARKUMAR  
 BARMAN  
 - ROY.

the kitchen, a few feet away, on hearing a noise, and witnessed the occurrence. She then went to the *uthan* and screamed out, whereupon the appellant escaped. Her cries attracted the attention of some neighbours who ran to the place and were informed by Bagala that the appellant had killed her mother-in-law.

On Saturday, the 7th December, 1912, after the delivery of the Judge's charge, the jury retired for about 50 minutes, and returned into Court and pronounced an unanimous verdict of guilty through the foreman. The Judge accepted the verdict, but deferred sentence till the 9th. On the 8th Syama Chandra Bose and Baijnath Barman, the pleaders for the appellant, appeared at the house of the Sessions Judge and informed him that the jurors had determined their verdict by casting lots. The Judge, thereupon, addressed a note to the trying Judge in the following terms:

"ADDITIONAL JUDGE—

The undersigned pleaders<sup>2</sup> inform me that in the last murder case tried by you, the jury arrived at their verdict by casting lots, and that they are prepared to produce witnesses to prove admissions by some of the jurors to this effect. I suggest that you inquire into this matter and refer it to the High Court if you consider the allegation proved.

*8th December 1912.*

(Sd.) J. D. CARGILL,

*Sessions Judge.*

<sup>1</sup>SYAMA CHANDRA BOSE.

BAIJNATH BARMAN."

On the following day the Additional Judge, considering it his duty to act on the verdict as declared in open Court, convicted and sentenced the appellant to death. He then held an inquiry and examined witnesses on oath. Mohim Chandra Roy, the first witness, deposed that on Saturday evening, the 7th December, one of the jurors, Sarat Chandra Majumdar, stated at a dinner party that four jurors were for returning a verdict of guilty, while he, the fifth, was

of an opposite opinion, and that, after each side had tried to win the other over, the verdict was arrived at by casting lots. Sudhanya Kumar De, an orderly of the third Subordinate Judge of Mymensingh, deposed that he saw the young Hindu juror put some bits of crumpled up paper in his *alwan*, shake them up and draw them out again. The foreman of the jury stated that he and three other jurors were of opinion that the accused was guilty, but that the other juror, an old Hindu (Sarat Chandra Majumdar), did not at first make up his mind, but on being pressed for an opinion said that the accused was guilty, but that he knew a *dharma pariksha* and would try the matter first by that test, whereupon he wrote something on two bits of paper, crumpled them up in his wrapper, closed his eyes and after repeating a Sanskrit verse took out one of the bits and said that the accused was guilty. The witness added that he himself had not in any way been influenced by the above test. Sarat Chandra Majumdar, the juror referred to, denied that the jurors had arrived at their verdict by casting lots. He stated that, after they had decided unanimously on a verdict of guilty, he made a test in the name of God by writing the word "God" on a piece of paper and crumpling it up with another piece of blank paper and drawing one of them, which was the former, in the belief that God would thus direct him. He concluded by alleging that he alone had made the test and for his personal guidance. The remaining jurors deposed that the test made by Sarat was not accepted by the others, who arrived at the verdict on consideration of the evidence and not by casting lots.

The appellant preferred an appeal from his conviction and sentence to the High Court, and the Additional Judge also referred the proceedings under section 374 of the Criminal Procedure Code.

1913  
 EMPEROR  
 v.  
 HARKUMAR  
 BARMAN  
 ROY.

1913  
 ENTEROR  
 r.  
 HARKUMAR  
 BARMAN  
 ROY.

*Mr K. N. Chaudhuri* (with him *Mr. Surita, Babu Upendra Kumar Roy, Babu Gobinda Chandra Dey and Babu Birenda Kumar De*), for the appellant. The evidence of a jurymen as to the grounds of the verdict has always been rejected on grounds of public policy, viz., the inconvenience and uncertainty that would arise if jurors were permitted to give evidence to defeat their verdicts and the possible conflict in their evidence: *Duke of Buccleuch v. Metropolitan Board of Works* (1). The evidence of the jurors, and of persons to whom admissions were made by them as to the manner in which they arrived at their verdict is, therefore, inadmissible. The Court must obtain its knowledge of the facts from other persons who had witnessed the same: *see* Taylor on Evidence, Vol. I (10th ed.), page 670; Russell on Crimes, Vol. I (7th ed.), page 604; *Vaise v. Delaval* (2), *Owen v. Warburton* (3), *Straker v. Graham* (4), *Burgess v. Langley* (5) and *Queen v. Murphy* (6). The drawing of lots by the jury would vitiate their verdict: *Hale v. Cove* (7), and *see* Halsbury's Laws of England, Vol. XVIII, page 255. Putting aside the evidence of the juror and of Mohim Chandra Roy, there is the statement of the orderly that he saw the young Hindu juror, Abinash Chunder Sinha, take pieces of paper, crumple them up and draw them out of his *alwan*. Though the evidence of the jurors is not admissible, the Court having read it, cannot eliminate it altogether from its mind, and, taken with the story of the orderly, it would appear that the other jurors must also have taken part in the test. The law requires a jurymen to exercise his own discretion, and to decide on the

(1) (1872) L. R. 5 E. & L. 418, 446, 449. (4) (1839) 4 M. & W. 721.

(2) (1785) 1 T. R. 11.

(5) (1843) 5 M. & G. 722.

(3) (1805) 1 B. & P. 326.

(6) (1869) L. R. 2 P. C. 535.

(7) (1725) 1 Str. 642.

evidence and not follow blindly the opinion of his fellows: *Petamber Jugi v. Nasaruddy* (1). If there is any doubt as to whether the verdict was arrived at properly or not, it is a good ground for remand. The opinion of the jury, though generally valuable on the facts, should be treated here as negligible.

*The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown. The cases cited support the view that the evidence of jurors and of persons speaking to admissions by them is inadmissible. The statement of the Judge's orderly does not prove that the verdict was given by casting lots.

*Cur. adv. vult.*

SHARFUDDIN J. This is a Reference under section 374 of the Criminal Procedure Code made by the Additional Sessions Judge of Mymensingh. There is also an appeal against the sentence of death by the appellant.

The prosecution case is as follows. Ganga Moyi Dasya was a tenant and a near neighbour of the accused. Between these there had been a dispute, for some time before the present occurrence, with regard to the occupation of a certain *bari* which was in possession of Ganga Moyi, the deceased.

On the 3rd September 1912 Ganga Moyi, at about noon, is said to have been sleeping in the *bari* in question, while her daughter-in-law Bagala Moyi Dasya (P. W. 1) was in the kitchen, which is just to the west of that *bari*, at a distance of five or six cubits, when suddenly Bagala heard a sound as if something had fallen down, and going to the *bari* she saw the accused cutting Ganga Moyi on the neck with a *dāo*. She went to the *uthan* of the *bari* and began to scream; she is also said to have seen the accused

1913  
EMPEROR  
v.  
HARKUMAR  
BARMAN  
ROY.

1913  
 ———  
 EMPEROR  
 v.  
 HARKUMAR  
 BARMAN  
 Roy.  
 ———  
 SHARFUDDIN  
 J.

running away. It is said that her screams attracted people who happened to be present in the near neighbourhood. The first man to arrive was one Syed Ali Kari (P. W. 2). He questioned Bagala, who told him that Harkumar, the accused, was the murderer. Other people also are said to have come up, to whom also she made the same statements.

[His Lordship then dealt with the evidence in detail and continued:]

The jury returned a unanimous verdict of guilty under section 302 of the Indian Penal Code, and the learned Sessions Judge accepting that verdict has passed the present sentence. From the record it appears that the jury returned to the Court after fifty minutes. It is clear, therefore, that their verdict was not a hasty verdict. This verdict was given on a Saturday, and the learned Judge intimated that he would pass orders on the following Monday. On Sunday following the Sessions Judge was informed by two pleaders of his Court that the jury had arrived at their verdict by casting lots. The Sessions Judge thereupon asked the Additional Sessions Judge who had tried the case to make an inquiry.

The story of casting lots in the jury room is this: Babu Mohim Chandra Roy, a senior pleader of that district, had one of the jurors named Sarat Chandra Majumdar as a guest on the evening following the close of the trial. He says that Sarat Chandra Majumdar had told him in the evening of that Saturday that the verdict had been arrived at by casting lots. As four jurors were for returning a verdict of guilty and Sarat Babu was in favour of a verdict of not guilty, the four jurors tried to win him to their side, and he tried to persuade them to his side. Neither side being able to persuade the other, they decided to decide the matter by casting lots. He further says

that his impression was that all the five jurors had consented to abide by the result.

Before we decide whether a statement of a juror as to what happened in the jury room is admissible or not, we desire to observe that it is not likely that, when four jurors were for a verdict of guilty, they would consent to abide by the result of the method alleged. In the inquiry all the jurors have been examined, and Mohim Babu and a man named Sudhanya Kumar Dey, who is an orderly of one of Subordinate Judges of that district, have also been examined.

No authority of any of the High Courts of this country has been placed before us. We have, however, many authorities of the Courts in England on the question whether a sworn statement of a juror that the verdict was arrived at by casting lots is or is not admissible. Some of those authorities are the following :—

(i) The case of *Owen v. Warburton*, (1) where it was held that an affidavit of a jurymen could not be received.

(ii) The case of *Straker v. Graham* (2), where it was held that, on a motion for a new trial, the Court will not receive an affidavit by an attorney of an admission made to him by one of the jurymen that the verdict was decided by lot.

(iii) The case of *Burgess v. Langley* (3). The Court refused to grant a rule *nisi* for a new trial upon an affidavit, stating that one of the jury had declared in open Court in the presence and hearing of the others that the verdict had been decided by casting lots.

(1) (1805) 1 B. & P. 326.

(2) (1839) 4 M. & W. 721.

(3) (1843) 5 M. & G. 722.

1913

EMPEROR

"

HANUKMAR

BARMAN

ROY.

SHARFUDIN

J.



1913  
 EMPEROR  
 v.  
 HARKUMAR  
 BARMAN  
 ROY.  
 SHARFUDDIN  
 J.

(iv) In the case of *Queen v. Murphy* (1), which was an appeal from the Supreme Court of New South Wales, it was remarked by their Lordships at page 549: "the Courts here have at times expressed reluctance, which we consider salutary, against receiving the separate statements of any of the individuals who had in combination formed a jury, in order to impeach their verdict."

On the strength of the above authorities we exclude from our consideration not only the statement of Mohim Babu, which is mere hearsay, but also the statements of the five jurors. There remains, however, the statement of Sudhanya Kumar Dey, an orderly, on which we could act, but his evidence is not sufficient to disclose any misdemeanour on the part of the jury. What he says is this: "I could see the young Hindu juror (Sarat Babu) take some paper crumpled up in his *alwan*, and shake them up and take them out again." This does not show that the verdict was arrived at by casting lots. We, therefore, cannot act on this evidence.

On a careful consideration of the evidence we are of opinion that Bagala, Syed Ali Kari and others, who heard Bagala mentioning the name of the accused, have been rightly believed by the learned Sessions Judge and the jury. That being our opinion, we dismiss the appeal and confirm the sentence of death.

RICHARDSON J. I agree. The fact the panchayet arrested the accused shortly after the murder and before the arrival of the police is strong in confirmation of the story told by the witness Bagala. The evidence of Mahomed Syed Ali Kari seems to have impressed the Judge, and no doubt the jury also. The Judge refers to the frank and straightforward

demeanour of the witness in the witness-box. There are other witnesses also who corroborate Bagala. As to motive, it is clear that the accused and the deceased were on bad terms. In the previous year the deceased had taken proceedings against the accused under section 107 of the Criminal Procedure Code. The allegation on behalf of the defence that Bagala was on terms of illicit intimacy with a brother of the panchayet is certainly not supported by the evidence adduced.

As to the suggestion that the verdict of the jury was arrived at by lot or ordeal, I agree that the statements of the individual jurors are inadmissible, and that the evidence of Sudhanya Kumar Dey is insufficient to justify us in coming to the conclusion that the jurors were guilty of any impropriety in the mode in which they arrived at their verdict.

E. H. M.

*Appeal dismissed.*

1913  


---

 EMPEROR  
 v.  
 HARKUMAR  
 BARMAN  
 ROY.  


---

 RICHARDSON.  
 J.

**CRIMINAL REVISION.***Before Cox and N. R. Chatterjea JJ.*

1913

BANGALI SHAH

*March 13.*

v.

EMPEROR.\*

*Ostensible means of subsistence—Conducting the play of “ring” game—  
Criminal Procedure Code (Act V of 1898), s. 109.*

The conducting of the “ring” game is an ostensible means of subsistence within the meaning of s. 109 of the Criminal Procedure Code.

*Hari Sing v. King-Emperor* (1) referred to.

THE petitioner conducted the game known as the “ring” game. He was arrested by the police, on the 11th December, 1912, and put up before the District Magistrate of Rungpore, with a report requesting the institution of proceedings under s. 109 of the Criminal Procedure Code. The Magistrate drew up a proceeding thereunder on the same day, and, after examining certain witnesses, postponed the case to the 17th. The petitioner contended that the play of the “ring” game was his means of subsistence and was legal. On the 17th, the Magistrate directed him to be bound down, in the sum of Rs. 100, with one surety in the like amount, to be of good behaviour for the period of one year, by the following order:—

The accused admits that he has no ostensible means of subsistence, except the play of what is known as the “ring” game. From what I have seen of this game, it appears to be one of cheating the ignorant and the gambler. Such a means of subsistence is neither honest nor sufficient. I, therefore, direct that the accused do execute a bond of Rs. 100, with one

\* Criminal Revision, No. 275 of 1913, against the order of K. C. De, District Magistrate of Rungpore, dated Dec. 17, 1912.

surety of Rs. 100, to be of good behaviour for one year. In default, he shall suffer rigorous imprisonment for one year.

1913

BANGALI  
SHAH  
v.  
EMPEROR.

*Babu Ramesh Chandra Sen*, for the petitioner. The play of the "ring" game is not illegal: see *Hari Singh v. King-Emperor* (1). It is an ostensible means of subsistence within s. 109 of the Code. Under the section, if the means of subsistence is ostensible, the question of its honesty does not arise. The Magistrate has come to the conclusion that the game was one of "cheating the ignorant and the gambler" from his own knowledge. We had no opportunity of cross-examining him thereon, and there is no evidence on the record to support his view.

No one appeared for the Crown.

COXE AND N. R. CHATTERJEA JJ. This was a Rule to show cause why the order binding the petitioner down to be of good behaviour, on the ground that he had no ostensible means of subsistence, should not be set aside on the ground that the facts found did not justify it. It appears that the petitioner's means of subsistence is the conduct of what is known as the "ring" game. Such a means of subsistence is certainly ostensible, and it will appear from the decision in the case of *Hari Singh v. King-Emperor* (1) that it is not an offence under the Gambling Act to conduct such a game. It is quite clear also that the game can be honestly conducted. The mere fact that the petitioner lives by this means does not justify the conclusion that he has no ostensible means of subsistence. The Rule is accordingly made absolute, and the order set aside.

E. H. M.

*Rule absolute.*

**APPELLATE CIVIL.***Before Jenkins C.J., and Mullick J.*

1913

March 19.

**BISSESWAR SONAMUT**

v.

**JASODA LAL CHOWDHRY.\***

*Execution of Decree—Mortgage-decree passed before the Code of 1908—  
Application for execution made after the Code of 1908 came into force,  
if governed by the new Code—Civil Procedure Code (Act V of 1908),  
ss. 1(2), 48, 154—General Clauses Act (X of 1897), s. 6.*

S. 48 of the new Code of Civil Procedure (Act V of 1908) governs an application for the execution of a mortgage-decree obtained even before that Code came into force.

S. 154 of the new Code clearly contemplates a retrospective effect of the Code and an interference with rights acquired under the old Code.

S. 1, cl. (2) of the new Code afforded ample opportunity to all persons having rights under the old Code to enforce them before the new Code came into operation.

*Kaunsilla v. Ishri Singh* (1) not followed.

SECOND APPEAL by Bisseswar Sonamut, the judgment-debtor.

In this matter, the preliminary mortgage-decree was passed on the 22nd September, 1896, in favour of the respondent in the present appeal. The decree for sale was made absolute on the 27th April, 1897. The decree-holder made several applications to execute the decree, the seventh being made on the 28th April, 1908. That application was finally set aside by the High Court on the 9th May, 1911. The next application was

\* Appeal from Appellate Order, No. 498 of 1912, against the order of A. J. Chotzner, District Judge of Backergunge, dated Sept. 10, 1912, affirming the order of R. C. Sen, Subordinate Judge of Barisal, dated June 29, 1912.

also rejected, on appeal, by the District Judge, leaving the decree-holders to file a fresh application. The present application was made on the 18th December, 1911. One of the points raised by the judgment-debtor was that the decree was barred inasmuch as the application would not be governed by section 230 of the former Code, which excluded mortgage-decrees from its purview, but by section 48 of the present Code, which does away with the distinction between mortgage and money-decrees. The Subordinate Judge overruled the objection of the judgment-debtor and allowed execution. The District Judge, on appeal, affirmed the decision of the Subordinate Judge. The judgment-debtor thereupon preferred this second appeal.

*Babu Ram Chandra Majumdar* (with him *Babu Abinash Chandra Guha*), for the appellant. The right acquired by the decree-holder was not such a right as he could enforce at any time. On this point and generally as to the effect of subsequent legislation, see *Starey v. Graham* (1), *The Idun* (2), *Parker v. London County Council* (3), *King v. Chandra Dharma* (4) and *Wright v. Hule* (5). It is a general principle of law that the law of limitation is a law relating to procedure having reference only to the *lex fori*: *Her Highness Ruckmaboye v. Lulloobhoy Mottichund* (6), *Ram Churn Bysack v. Luckhee Kant Bornick* (7). See also *Jogodanund Singh v. Amrita Lal Sircar* (8). The present law should govern the period of limitation: *Towler v. Chatterton* (9), *Reg. v.*

1913  
BISSESWAR  
SONAMUT  
n.  
JASODA LAL  
CHOWDHRY.

(1) [1899] 1 Q. B. 406, 411.

(2) [1899] P. 236.

(3) [1904] 2 K. B. 501.

(4) [1905] 2 K. B. 335.

(5) (1860) 6 H. & N. 227 ;

123 R. R. 477.

(6) (1852) 5 Moo. I. A. 234, 265, 266.

(7) (1871) 16 W. R. F. B. 1, 8.

(8) (1895) I. L. R. 22 Calc. 767.

(9) (1829) 6 Bing. 258 ; 130 E. R.

1280 ; 31 R. R. 411.

1913  
BISSESWAR  
SONAMIT  
P.  
JASODA LAL  
CHOWDHRY.

*Leeds and Bradford Railway Co.* (1), *Colonial Sugar Refining Co., Ltd. v. Irving* (2). See also Maxwell "On the Interpretation of Statutes," 4th Ed., p. 336.

There cannot be a vested interest in the course of procedure: *Republic of Costa Rica v. Erlanger* (3), *In re Joseph Suche & Co., Ltd.* (4). Maxwell "On the Interpretation of Statutes," pp. 338 and 339, *et seq.* Section 48 of the Code of 1908 must now govern cases on the question of procedure: *Queen v. Inhabitants of St. Mary, Whitechapel* (5).

There is no chance of an injustice in this case from change of law, as there was sufficient interval between the passing of the new Code and its coming into operation. It was passed on the 21st March, 1908, and it came into operation on the 1st January, 1909. See in this connection, *Ex parte Rashleigh* (6), *Williams v. Harding* (7) and General Clauses Act, I of 1868, s 6 and VII of 1897, sec. 6. The Allahabad case of *Kaun-silla v. Ishri Singh* (8) is not good law. See *Robinson v. Currey* (9).

The general principle is that alterations in procedure have always retrospective effect: *Attorney-General v. Sillem* (10), *Warner v. Murdoch* (11). See also in this connection the cases above cited: *Towler v. Chatterton* (12), and *Wright v. Hale* (13).

The present application for execution cannot be said to be a continuation of the previous application of 1908.

(1) (1852) 21 L. J. M. C. 193.

(2) [1905] A. C. 369.

(3) (1876) 3 Ch. D. 62, 69.

(4) (1875) 1 Ch. D. 48, 50.

(5) (1848) 12 Q. B. 120, 127 ;

116 E. R. 811.

(6) (1875) 2 Ch. D. 9.

(7) (1866) L. R. 1 H. L. 9.

(8) (1910) I. L. R. 32 All. 499.

(9) (1881) 7 Q. B. D. 465.

(10) (1864) 10 H. L. 706, 764 ;  
11 E. R. 1220, 1225.

(11) (1877) 4 Ch. D. 750.

(12) (1829) 6 Bing. 258 ; 130  
E. R. 1280 ; 31 R. R. 411.

(13) (1860) 6 H. & N. 227 ;  
123 R. R. 477.

The Indian cases on the point are: *Amlook Chand Parrack v. Sarat Chunder Mukerjee* (1), *Arayil Kali Amma v. Palappakkara Manakal* (2), *Hope Mills, Ltd. v. Vithaldas Praniirandas* (3), *Srimati Raikishori Dasya v. Mukunda Lal Dutt* (4), *Government of Bombay v. Dorabji Balabhai* (5), *Chajmal Das v. Jagadamba Prasad* (6), *Abdul Karim v. Mani Hansrai* (7), *Chidambaram Chetty v. Karuppan Chetty* (8), and *Molam Chand v. Askuran Boid* (9).

*Babu Dwarkanath Chakrabarti* (with him *Dr. Saratchandra Basak*), for the respondent. It is no use citing English cases on the point. The case of *Kaunsilla v. Ishri Singh* (10) is exactly in point and in my favour.

JENKINS C.J. This is an appeal from an appellate order made in execution proceedings. The decree-holder, who had obtained a decree on a mortgage, applied successfully to the Court for sale of the property. Thereupon, the judgment-debtor presented the application out of which the present appeal arises. He sought to have this sale-order set aside on the ground that the application was barred under section 48 of the Code of Civil Procedure. His application was dismissed by the Subordinate Judge, and this order has been confirmed by the lower Appellate Court. It is from this last order of the lower Appellate Court that the present appeal is preferred. It is necessary to set out a few facts to explain the case. The preliminary decree on the mortgage was passed on the

1913

BISSESWAH  
SONAMITv.  
JASODA LAL  
CHOWDHRY.

(1) (1911) I. L. R. 38 Cal. 913.

(2) (1910) 20 Mad. L. J. 347.

(3) (1910) 12 Bom. L. R. 730.

(4) (1911) 15 C. W. N. 965.

(5) (1874) 11 Bom. H. C. 117.

(6) (1889) I. L. R. 11 All. 408.

(7) (1876) I. L. R. 1 Bom. 295.

(8) (1910) I. L. R. 35 Mad. 678.

(9) (1912) R. A. Nos. 86, 87 of  
1912, (unreported.)

(10) (1910) I. L. R. 32 All. 499.



1913  
BIRSESWAR  
SONAMUT  
r.  
JASODA LAL  
CHOWDHRY  
JENKINS C.J.

22nd of September, 1896, and it was made absolute on the 27th of April, 1897. The application for sale which is impugned by the application now under consideration was made on the 18th of December, 1911, more than twelve years beyond the date of the decree. This, it is said, brings into play the provisions of section 48 of the present Code of Civil Procedure, which provides that "where an application to execute a decree (not being a decree granting an injunction) has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed." By way of answer to this, it is brought to our notice that there were many applications for execution, and that on the 28th of April, 1908, the seventh application was preferred. On that application there was a sale, but on the 9th of May, 1911, that sale was set aside by the High Court. The decree-holder again sought to make his decree fruitful and made an application for sale. That was allowed by the Subordinate Judge, but on appeal the District Judge dealt with the matter in this way: He said—"It is urged on behalf of the judgment-debtor that inasmuch as the original prayer was superseded by the amended application there was only one prayer which was for the sale of half the property, and that having been declared illegal there is no application at all of which the Court can take cognizance. This argument appears to me to be well-founded. There can be no doubt that the amended application took the place of the original application, which is therefore to all intents and purposes non-existent. That being so, I cannot see how, when the amended application has been dismissed, the decree-holders can now fall back on the original as though it were still unamended. I would, therefore, allow this

appeal, leaving the decree-holders to file a fresh application." The just result of that order was that the application of the 28th of April, 1908, was dismissed. It is the order of dismissal that has occasioned the trouble in this case. The first question that we have to consider is whether the application for sale, which was subsequently granted and is now being impugned, is a fresh application within the meaning of section 48, or a continuation of the application of the 28th of April, 1908. Seeing that the application of the 28th of April was dismissed, it appears to be impossible to treat this as a continuation of that dismissed application. Is it then a fresh application within section 48? It has been argued before us that it is not, or at any rate, that the bar that arises after the expiration of twelve years, as provided by that section, does not apply. There is authority for this view in *Kaunsilla v. Ishri Singh* (1). But I must confess that I feel some difficulty as to the decision in that case. When it was put to the learned vakil for the respondent in this case whether he was making his application under the Code of 1908. or the repealed Code of 1882, he had to concede that it was the new Code of 1908. If so, then section 48 is an integral part of that Code, and no application under that Code, as it appears to me, can be made in disregard of its express conditions. I say that, bearing in mind the provisions of section 6 of the General Clauses Act. In this connection it is important to observe that the Legislature evidently considered this Code might and would interfere with rights, for there is an express provision in section 154 that "nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement," a provision that would have been unnecessary unless the Code as framed would

1913  
 BISSESWAR  
 SONAMUT  
 P.  
 JASODA LAL  
 CHOWDHRY  
 JENKINS C.J

1913  
 BISENWAR  
 SONAMUT  
 P.  
 JASODA LAL  
 CHOWDHRY  
 JENKINS C.J.

affect existing rights under the old Code. It has been urged before us that this view would involve hardship, that rights would be imperilled, if not confiscated; but this overlooks the provision which prescribed that, though the Code was passed in March 1908, it should not come into operation until January 1909. That provision afforded ample opportunity to all persons having rights under the old Code to enforce them before the new Code came into operation.

In my opinion the decision of the District Judge is erroneous, and I think his order must be reversed, and the application for sale set aside as barred by section 48 of the Code of Civil Procedure.

The respondent must pay the appellant's costs.

MULLICK J. I agree.

S. M.

*Appeal allowed.*

## ORIGINAL CIVIL.

*Before Fletcher J.*

1913  
 March 26.

NANDA LAL ROY

*v.*

DHIRENDRA NATH CHAKRAVARTI.\*

*Damdupat, rule of—Decree in mortgage-suit between Hindus—Interest accruing after date fixed for redemption, whether rule applicable to.*

The rule of *damdupat* applies to Hindus only so long as the relation between the parties is contractual, and ceases to apply when the matter has passed from the realm of contract into that of judgment. Where a decree has been passed on a mortgage, the rule does not apply to the interest accruing after the date fixed for redemption.

*In the matter of Hari Lall Mullick* (1) followed.

*Ram Kanye Audhicary v. Cally Churn Dey* (2) not followed.

*Sundar Koer v. Sham Krishen* (3) referred to.

1913

NANDA LAL  
ROY

v.

DHIRENDRA  
NATH  
CHAKRAVARTI.

## APPLICATION.

By an indenture of mortgage dated the 6th August, 1901, one Nitye Chand Chakravarti mortgaged the premises No. 43, Machua Bazar Street, in Calcutta, to the plaintiffs, in consideration of the sum of Rs. 13,000 lent and advanced by the plaintiffs, the loan to bear interest at a certain rate. The parties to the mortgage were all Hindus.

Nitye Chand Chakravarti died, and thereupon litigation ensued between his heirs and legal representatives, and on the 29th August, 1904, Mr. S. M. Bose, an advocate, was appointed Receiver of the estate and entered into possession.

On the 12th September, 1908, this suit was instituted by the plaintiffs against the heirs of Nitye Chand Chakravarti and the Receiver for a decree on their mortgage.

By a decree made on the 26th April, 1909, it was, *inter alia*, referred to the Registrar to take an account and to take into consideration the rule of *damdapat*, if the same should be applicable, and to report the amount found due to the plaintiffs upon the taking of the accounts, and there was an order for the sale of the mortgaged property in case of default to pay the reported amount. It was further ordered and decreed that in default of the defendants paying into Court what should be reported to be due to the plaintiffs for principal and interest, together with costs and interest thereon at the rate of 6 per cent. per annum from the date of taxation until realization, within six months from the date on which the

(1) (1906) I. L. R. 33 Calc. 1269.

(3) (1906) I. L. R. 34 Calc. 150 ;

(2) (1894) I. L. R. 21 Calc. 840.

L. R. 34 I. A. 9.

1913  
NANDA LAL  
ROY  
v.  
DHIRENDRA  
NATH  
CHAKRAVARTI.

certificate of the Registrar should be countersigned by a Judge, the interest due at the end of the said six months on the said principal sum should be added thereto and that thereafter interest should be computed and allowed on the aggregate amount at the rate of 6 per cent. per annum.

By his report dated the 6th September, 1910, the Registrar reported that on the 29th March, 1911, there would be due to the plaintiffs upon the mortgage the sum of Rs. 13,000 for principal and Rs. 17,688-5-4 for interest, calculated up to the 29th March, 1911, and as the interest exceeded the principal the Registrar allowed only Rs. 13,000 for interest, and disallowed the balance under the rule of *damdupat*.

On the 22nd August, 1911, the final decree for sale was made in the mortgage suit, whereby it was, *inter alia*, ordered and decreed that the premises should be sold by the Registrar, and that the proceeds of sale should be applied towards payment to the plaintiffs of what was due to them under their decree and costs.

At the subsequent reference before the Registrar in connection with the settlement of the conditions and notification of sale, the plaintiffs refused to join in the conveyance releasing the property unless they were allowed further interest in addition to the sum of Rs. 13,000 allowed by the Registrar.

On the 28th November, 1912, it was arranged that the sale of the property should be completed and that a sum of Rs. 13,000 should be deposited with the Receiver out of the sale-proceeds, and that the plaintiff should apply to Court for an order for the payment of the further interest.

Thereafter the property was sold, the plaintiffs joining in the conveyance, and on the 14th January, 1913, they received from the Receiver the sum of Rs. 26,000,

without prejudice to their rights "to claim further interest on the reported amount at the rate of six per cent. per annum from the date of the report until the the date of realization."

On the 14th March, 1913, the plaintiffs filed this petition praying, *inter alia*, that "the defendants may be ordered to pay the sum of Rs. 2,799-5-6, being the interest on the sum of Rs. 26,000 from the 29th March, 1911, to the 14th January, 1913."

*Mr. C. C. Ghose*, for the plaintiffs, petitioners. The rule of *damdapat* applies only so long as the relation of creditor and debtor exists, but not when the contractual relation has come to an end by reason of a decree: *In the matter of Hari Lall Mullick* (1). It is true *Sale J.* took a contrary view in *Ram Kanye Audhicary v. Cally Churn Dey* (2). But *Woodroffe J.*'s opinion in the later case (3) is supported in principle by the Privy Council in *Sundar Koer v. Shyam Krishen* (4).

In the present case the contractual relation became merged in the decree on the 29th March, 1911. After this date, the rule ceased to apply, and the plaintiffs are entitled to further interest as from that date.

*Mr. Chakravarti* (with him *Mr. N. N. Sircar*), for the opposite party. If the rule of *damdapat* is once applied, it must always be applied. The fact of a decree supervening can make no difference: *Ram Kanye Audhicary v. Cally Churn Dey* (2).

FLETCHER J. This is a matter which relates to what is known as the rule of *damdapat*. The rule applies to Hindus dealing with one another, and is one of equity and good sense. It is that the amount of

(1) (1906) I. L. R. 33 Calc. 1269, 1276. (3) (1906) I. L. R. 33 Calc. 1269.

(2) (1894) I. L. R. 21 Calc. 840.

(4) (1906) I. L. R. 34 Calc. 150 ;

L. R. 34 I. A. 9.

1913  
NANDA LAL  
ROY  
v.  
DHIRENDRA  
NATH  
CHAKRAVARTI.

1913  
 NANDA LAL  
 ROY  
 v.  
 DHIRENDRA  
 NATH  
 CHAKRAVARTI.  
 ———  
 FLETCHER J.

interest a creditor can recover against his debtor shall not exceed the amount of principal. The present application arises in a mortgage suit, and arises under these circumstances. The question is, does this rule of *damdupat* apply to cases where default is made by the mortgagor in payment of the principal, interest and costs after the day appointed for payment by the Court. The decisions in this Court on that point are contradictory. The first decision that has been referred to is that of Mr. Justice Sale in *Ram Kanya Audhicary v. Cally Churn Dey* (1). A decision to the contrary effect was given by Mr. Justice Woodroffe in an Insolvency case in the matter of *Hari Lal Mullick* (2). In my opinion, so far as the general principle applies, the decision of Mr. Justice Woodroffe seems to me to be correct in principle. This rule of *damdupat* applies as a matter of contract when Hindus are contracting with one another. It has nothing to do with the decrees of the Courts after the matter has passed from the realm of contract into that of judgment. It seems to me, on the decision of the Privy Council (which did not turn on the matter of *damdupat*, but on the question of rate of interest) in *Sundar Koer v. Sham Krishen* (3), that matter is not open to doubt. The only question in the present case is, what does this decree say? Is this interest to be computed and allowed, if the mortgager makes default in repayment on the day fixed, subject to the rule of *damdupat*, or not? It seems to me quite clear on the wording of the decree that the rule of *damdupat* is only to be observed until the rights of parties pass from contract into that of judgment. I cannot in this decree read the words "subject to rule of *damdupat* if the same should be applicable" in the portion

(1) (1894) I. L. R. 21 Calc. 840.

(2) (1906) I. L. R. 23 Calc. 1269.

(3) (1906) I. L. R. 34 Calc. 150; L. R. 34 I. A. 9.

of the decree, as having application to the interest other than the interest due at the end of six months from the date on which the certificate should be signed. It seems to me quite clear what the decree says: "thereafter the principal and interest are to become an aggregate amount, and interest is to be computed on the aggregate amount at the rate of six per cent. per annum, such aggregate amount with interest computed and allowed as aforesaid being hereinafter mentioned as the amount payable to the plaintiff under the decree." It cannot be that the words "computed and allowed as aforesaid subject to the rule of *damdapat*" are to apply to this decree after the date fixed for repayment. Moreover, it is to be noticed that these words, on which much reliance has been placed, appear in parenthesis in a definition clause as to what is thereafter referred to as "the amount payable to the plaintiff." It is quite impossible on a definition clause like that to say that the Court was going to make the rule of *damdapat* applicable under this decree to interest payable, not by virtue of the contract, but by virtue of the decree itself. I think that the application by the plaintiff in this case to have the balance order, and to recover the amount of interest asked for, must go. The defendants must pay to the plaintiffs their costs of this application. The balance order will be for Rs. 2,799-15-6.

1913  
 NANDA LAL  
 ROY  
 v.  
 DHIRENDRA  
 NATH  
 CHAKRAVARTI.  
 FLETCHER J.

*Application allowed.*

Attorney for the plaintiffs: *M. L. Seal.*

Attorneys for the defendants: *B. N. Basu & Co.,  
 A. N. Ghose.*

J. C.



## CIVIL RULE

Before Stephen and Holmwood JJ.

1913  
March 27.

INDIA GENERAL STEAM NAVIGATION  
COMPANY

v.

BHAGWAN CHANDRA PAL.\*

*Carriers—Carriers Act (III of 1865), ss. 6, 7, 8, 9—Liability of steamer company for goods damaged in transit—Onus of proof—Negligence or criminal act of company, its servant, or agent presumed.*

Where a steamer company forwarded a consignment of four tins of oil on terms contained in what is known as an owner's risk note, after receiving the tins in good condition, and the consignee refused to take delivery as one tin was cut open and partly empty and another was quite empty, and brought a suit for the value of the oil :—

*Held*, that the steamer company, being a common carrier, was in a different position from railway companies, who are only bailees, coming under ss. 151, 152 and 161 of the Contract Act. Its liability is, therefore, that of an insurer subject to certain exceptions under s. 6 of the Carriers Act.

*Held*, also, that the onus was, as a matter of course, on the steamer company as common carriers, even in a case covered by special contract, to disprove negligence, as the loss of the goods is *prima facie* evidence of negligence or criminal act of the carrier, his servants or agents.

*Choutmull Doogur v. The Rivers Steam Navigation Co.* (1) followed.

*Irrawaddy Flotilla Co. v. Bugawulus* (2), *Lalchand Sew Karan v. E. I. Ry. Co.* (3) referred to.

*Shenharut Ram v. B. and N.-W. Ry. Co.* (4) not followed.

THE facts are briefly as follows. A Dacca firm sent to the plaintiff, opposite party, four tins of *til* oil

\* Civil Rule, No. 46 of 1913, against the order of Ahmadulla, Small Cause Court Judge of Silchar, Cachar, dated Oct. 9, 1912.

(1) (1897) I. L. R. 24 Calc. 786.

(3) (1913) 17 C. W. N. 635 B.

(2) (1891) I. L. R. 18 Calc. 620.

(4) (1912) 16 C. W. N. 766.

through the defendant company at owner's risk. The tins weighed 1 maund 36 seers 8 chittaks, and were apparently in good condition when delivered to the defendant's servants at Dacca. On 21st March the plaintiff called at Silchar Ghât for taking delivery of the tins, and found one tin cut open at the top and its contents gone in part, another was entirely empty, and the other two in good condition. He refused to take delivery unless the consignment was weighed and a note made to that effect on the bill, which the defendant company's servants refused to do. Hence delivery was not taken, and this suit was instituted after serving the defendant company with notice.

1913  
INDIA  
GENERAL  
STEAM  
NAVIGATION  
COMPANY  
v.  
BHAQWAN  
CHANDRA  
PAL.

The defendant company denied liability, alleging that the goods were carried at owner's risk, which was a special contract, and that there was no negligence on the part of the company's servants.

The learned Small Cause Court Judge held that, although the consignment was carried under a special contract, as the tins had been received by the defendants' servants in good condition, they were responsible for the cutting and emptying of the tins, which was a criminal act, and the liability had to be fixed on the defendants. In this view of the case, he gave plaintiff a decree for Rs. 41-12, being the price of the oil, but without any damages, as the goods were carried at owner's risk.

The defendant company, thereupon, moved the High Court and obtained this Rule.

*Mr. B. C. Mitter, Babu Provash Chandra Mitter and Babu Ambica Pada Chowdhury*, for the petitioners.

*Babu Tara Kishore Chowdhury and Babu Braia Lal Chuckerbutty*, for the opposite party.

*Cur. adv. vult.*

1913  
INDIA  
GENERAL  
STEAM  
NAVIGATION  
COMPANY  
v.  
BHAGWAN  
CHANDRA  
PAL.

STEPHEN J. The facts of this case are as follows.

The plaintiff in a Small Cause Court suit, who shows cause as the opposite party to a Rule before us, was the consignee of four tins of oil forwarded to him from Dacca by the defendants, the present petitioners, on terms contained in what is known as an owner's risk note. The defendants received the tins in good condition and carried them to Silchar, where they called on the plaintiff to take delivery. This he refused to do, because one tin was cut open and partly empty and another was quite empty, but brought a suit for the value of the oil. The Court below decreed the suit on the ground that the company's servants were responsible for what had happened. No evidence was given on either side to show how the two tins that were not full had been tampered with.

This Court has granted a Rule calling on the opposite party to show cause why the decision of the Small Cause Court should not be set aside or modified on the ground that the plaintiff was wrong in not taking delivery, and was therefore not entitled to the value of all the four tins; and that the Court should have held that the onus was on the plaintiff to prove negligence on the part of the defendants, or that the loss of the missing oil was due to theft by the servants or agents of the defendants.

The first ground has not been pressed before us.

The second seems to us to be amply covered by authority.

There is no doubt that the defendant company is a common carrier, and, therefore, subject to the provisions of the Carriers Act, 1865, and in a different position from a railway company, which is only a bailee, under sections 151, 152 and 161 of the Contract Act, as far as the carriage of goods is concerned: see

*Irrawaddy Flottilla Co. v. Bugwandas* (1). Its liability is, therefore, that of an insurer; but by section 6 of the Carriers Act it can, subject to exceptions that do not apply here, limit that liability, though, by section 8, it will be liable for loss of, or damage to, any property arising "from the negligence or criminal act of the carrier or any of his agents or servants."

Section 9 then enacts: "In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents." The special contract in this case exempts the defendant company from liability for any "loss or damage of whatever nature or kind soever, unless it has arisen from the negligence or criminal act of their servants or agents."

In dealing with a case arising under the same Act, covered by a special contract in what are practically similar terms, where the goods in the possession of the bailee were destroyed by fire, Maclean C.J. treated it as a matter of course that the common carrier defendant must disprove negligence. Macpherson J. said: "the effect of the 9th section of the Carriers Act is to make the loss of goods evidence of negligence which the carrier must displace." Trevelyan J. held that "the loss of the goods is *primâ facie* evidence of the negligence or criminal act of the carrier, his servants or agents, and, therefore, if the carrier seeks to exempt himself from liability, he must negative such *primâ facie* evidence, that is to say, he must prove that the loss was or must have been occasioned otherwise than by the negligence or

1913  
INDIA  
GENERAL  
STEAM  
NAVIGATION  
COMPANY  
v.  
BHAGWAN  
CHANDRA  
PAL.  
STEPHEN J.

1913  
 ———  
 INDIA  
 GENERAL  
 STEAM  
 NAVIGATION  
 COMPANY  
 v.  
 BHAGWAN  
 CHANDRA  
 PAL.  
 ———  
 STEPHEN J.

criminal act of himself, his servants or agents":  
*Choutmull Doogur v. The Rivers Steam Navigation Co.*(1).

The provisions of the Carriers Act seem to us to be quite clear, and we find it impossible to distinguish the present case from that which we have just quoted. We have been referred to decisions relating to railways which seem to be decided in a contrary view, but in view of the fact that a railway company is not a common carrier, we cannot consider that they have any application to the present case.

The result is that we hold that the case was rightly decided in the Court below as far as the question of onus is concerned. The Rule is therefore dismissed with costs.

HOLMWOOD J. I agree with my learned brother. I think that under the Carriers Act a *prima facie* case of ordinary care and caution must be made out by the defendant company.

The judgment in *Lalchand Sew Karan v. The E. I. Ry. Co.* (2) clearly brings this out even in the case of the Railway Act, and there is nothing in *Sheobarut Ram v. B. and N.-W. Ry. Co.* (3) to affect the long course of decisions under the Carriers Act. I would, therefore, discharge this Rule, as no evidence whatever was offered by the company.

G. S.

*Rule discharged.*

(1) (1897) I. L. R. 24 Cal. 786.      (2) (1913) 17 C. W. N. 635n.

(3) (1912) 16 C. W. N. 766.

## FULL BENCH,

*Before Jenkins C.J., Harington, Stephen, Mookerjee and Holmrood JJ.*

DEBI PROSAD CHOWDHURY

v.

GOLAP BHAGAT.\*

1913

April 1.

*Hindu Law—Alienation—Mortgage by widow of part of the estate—Legal necessity—Presumption—Reversioner.*

Alienation by way of mortgage by a Hindu widow, as heiress, of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable enquiry and honest belief as to its existence, but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or of reasonable enquiry and honest belief raised by such consent is not rebutted by more cogent proof.

*Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (1, considered.

*Bujrangi Singh v. Manokarnika Bakhsh Singh* (2) referred to.

## REFERENCE to Full Bench.

This reference arose out of a suit for possession on establishment of title to certain lands. The appeal in the High Court was by the plaintiff.

The reference to Full Bench by Stephen and D. Chatterjee JJ. was as follows:—

STEPHEN J. This suit was brought by the appellant to recover possession of certain *mauzahs* as the heir of one Shib Nag Chandi, who became entitled to them after the death of Shib Nag's widow, Rani Radha Chowdhurani.

The case came before us on appeal, and it was not disputed that the appellant is Shib Nag's heir, and the only question that has been argued is whether his claim is subject to a usufructuary mortgage executed by the

\* Reference to a Full Bench in appeal from Original Decree No. 153 of 1908.

(1) (1884) 1. L. R. 10 Calc. 1102.

(2) (1907) 1. L. R. 30 All. 1 ;

L. R. 35 I. A. 1.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.

widow in favour of defendant No. 2 on the 23rd Bhadra, 1293, to secure a loan of Rs. 7,000. It is contended by the defendant that this mortgage is valid as against the plaintiff because it was made for legal necessity, and because it was consented to by a man named Harbans Tewari, the son of a daughter of Shib Nag, who was at the time Shib Nag's heir and therefore entitled to mortgage property after the widow's death. The lower Court has found both points in the defendant's favour and has dismissed the suit.

On the first point we cannot agree with the lower Court. According to the recitals in the bond, the Rs. 7,000 was borrowed to pay off debts to four men, Surja Narain, Panna Lal, Shib Nath, and the defendant. Evidence is produced to show that these debts existed and were for the most part eventually paid; but there is none to show that they were incurred for any purpose that can be considered a legal necessity. As regards the debts to the defendant we have recitals in a mortgage to Surja Narain Singh that money was required for the payment of Government revenue, the expense of Harbans' marriage and the performance of a religious ceremony; as regards the debt due to Shib Nath we have practically no evidence at all. This discloses no evidence of legal necessity in respect of either of these debts, and very little reliance is placed by the respondent on the debts due to either of these men. As regards the debts due to Surja Narain and Panna Lal, the case is rather stronger, because the defendant eventually paid off the balance of their debts. The circumstances of this payment, however, do not appear from the record, and there is nothing to show that the plaintiff's statement that he paid only to avoid litigation is incorrect; we consequently cannot find that he is estopped for questioning the legal necessity of the expenses for which the debts which he partly paid off were incurred. The only evidence that we have as to the circumstances of the widow at the time she executed the bond, on which reliance is placed, goes to show that, in 1312, the income of the estate was something like Rs. 20,000 a year, which does not help the defendant.

On the evidence relating to the existence of necessity, apart from Harbans' conduct, we are of opinion, therefore, that it is not proved that the bond relied on in this case was executed for any purpose of legal necessity.

On the second point the facts are simple. The mortgage is a usufructuary mortgage. It is signed by the widow and witnessed by Harbans, who adds, "I accept this document." Had Harbans survived the widow he would in any event have become exclusively entitled to the property which was the subject matter of the mortgage. He managed the widow's affairs at the time of the mortgage, and had witnessed certainly two other similar documents, and expressed himself as accepting and consenting to one of them. The present defendant is not his heir.

Under these circumstances, the appellant before us, the plaintiff in the suit, has argued that, whatever may be the law as to an alienation of the whole of a widow's interest in her estate with the consent of the reversioner, it does not apply to alienation by way of mortgage, and he relies on the decision in *Hari Kissen Bhagat v. Bajrang Sahai Singh* (1) to support his contention. In that case, which is not distinguishable on the facts from the present, Doss J. says, "I think that the doctrine of surrender upon which the validity of a sale out and out of the whole or any portion of the inheritance with the consent of all the immediate reversioners is based, cannot legitimately be extended to the case of a mortgage where *ex hypothesi* the widow still retains the ownership of the estate though subject to the liability created by the mortgage." As I am unable to accept this holding as a correct exposition of the law applicable to the case, I will notice briefly the state of the law at the time of that decision. For present purposes it is not necessary to go further back than the decision of a Full Bench of this Court in *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (2), where it was decided that a Hindu widow could relinquish her estate to the next male heir of her husband; she could therefore alienate it merely with his consent and without any legal necessity. Some of the Court expressed a doubt as to the consonance of this decision with sound principles of Hindu law, but felt themselves constrained to come to the conclusion they did by a long course of decided cases. Much the same position was adopted in *Hem Chunder Sanjal v. Sarnamoyi Debi* (3), where the power of a widow to alienate, as distinguished from relinquishing her estate, is referred to authority rather than principle. The matter has been recently considered by Privy Council in the case of *Bajrangi Singh v. Manokarnika Baksh Singh* (4), where the decisions in *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (2) and subsequent cases were considered, and the decision in the former was left undisturbed.

There is thus no doubt as to the power of a widow to alienate the whole of her interest in her husband's estate with the consent of the reversioner. The question is whether she can alienate a portion of her interest in the same way. It has been decided that she may alienate the whole of her interest in a portion of the estate: see *Pulin Chandra Mandal v. Bolai Mandal* (5) and the cases there quoted. This infringes to some extent on the theory suggested in *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (2) that the relinquishment by the widow makes alienation possible because it produces effects similar to those which would follow on the death of the widow, and

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.

(1) (1909) 13 C.W.N. 544.

(4) (1907) I. L. R. 30 All. 1 ;

(2) (1884) I. L. R. 10 Calc. 1102.

L. R. 35 I. A. 1.

(3) (1894) I. L. R. 22 Calc. 354.

(5) (1908) I. L. R. 35 Calc. 939.



1913  
 DEBI  
 PROSAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.

suggests that she may be competent to alienate part of her interest in the whole. In *Sankar Nath Mukerji v. Bejoy Gopal Mukerji* (1), it was held that a lease by a Hindu widow for sixty years which was ratified by the next reversioners was valid, which does not seem as if her power of alienation depended on her surrender of her life estate.

On the other hand, it was laid down by the Privy Council in *Behari Lal v. Madho Lal Ahir Gayawal* (2) that in order for a widow to accelerate the estate of an heir "it was essentially necessary" that she should "withdraw her own life estate, so that the whole estate should get vested at once in the grantee." This would seem to make an alienation by way of mortgage invalid; but in that case the effect of the alienation was to leave the management of certain ceremonies in the hands of the heir, while the widow retained her life estate, and the necessity for the removal of the life estate was based on the desirability of a check on the frequency of such conveyances. The words, therefore, as to the withdrawal of the whole life estate should perhaps not be read as being of general application, and the case may be considered as deciding no more than that the widow's alienation is invalid if it is illusory, as was the case as regarded a moiety of the estate alienated in *Hem Chunder Sanyal v. Surnamoyi Debi* (3).

In this state of authorities I cannot consider that the doctrine of surrender or relinquishment has been recognised as so completely the basis of the validity of an out and out sale by a widow with the reversioner's consent as to justify the conclusion that an alienation by mortgage with the same consent is invalid. It is for this reason that I entertain the doubts as to the correctness of the decision in *Hari Kissen Bhagat's* (5) case that I have mentioned. But I may also add that that decision was based on the decision of the Privy Council in *Sham Sundar Lal v. Achhan Kunwar* (4), and Doss J. in commenting on which says in *Hari Kissen Bhagat v. Bajrang Sahai Singh* (5) "this decision clearly shows that where a Hindu widow borrows money on mortgage of her husband's estate, though the transaction may be concurred in or consented to by the next reversioner, such consent or concurrence cannot have the effect of conferring on the deed a larger operation than a mortgage of the limited interest only." I cannot agree in this view of the effect of the decision, as the Privy Council expressly held that there was no such consent by the kindred of the widow as would raise a presumption that the transaction was a fair one, or one justified by Hindu law, and they then point out what kind of consent would be necessary to validate the mortgage bonds in question.

(1) (1908) 13 C. W. N. 201.

(3) (1894) I. L. R. 22 Cal. 354.

(2) (1891) I. L. R. 19 Cal. 236 ; (4) (1898) I. L. R. 21 All. 71 ;

L. R. 19 I. A. 30.

L. R. 25 I. A. 183.

(5) (1909) 13 C. W. N. 544, 548.

Under these circumstances we refer the following question to the Full Bench :—

Is the alienation, by way of mortgage by a Hindu widow of a portion of the estate of her husband without any proved legal necessity but with the consent of the next reversioner for the time being, valid and binding on the actual reversioner who is not the heir of the consenting reversioner ?

If the question is answered in the affirmative, this appeal is dismissed with costs. If it is answered in the negative, the appeal is allowed ; the decree of the lower Court is set aside, the suit is decreed in favour of the plaintiff as far as the three *manzars* are concerned, and the plaintiff is entitled to his costs in this Court and the Court below.

D. CHATTERJEE J. I agree with my learned brother in holding that no legal necessity has been proved in this case.

The next question that arises is whether the mortgage by Rani Radha Chowdhurani, with the consent and co-operation of Harbans, the then next reversioner, is binding upon the plaintiff who is not the heir of Harbans. This question has been decided in favour of the appellant in the case of *Hari Kissen Bhagat v. Bajrang Sahai Singh* (1). It is contended, however, by the learned vakil for the respondent, first, that the said case is distinguishable from the present and, secondly, that it is not correct. The distinction pointed out is that in that case the next reversioner merely attested the deed as a witness, whereas in this case he has accepted the deed. I do not think that the distinction is material—the object in both cases being the same—that of having the approval of the next reversioner. The objection to the correctness of the ruling, however, seems to be substantial. Mr. Justice Doss, who delivered the main judgment in the case, first says that, even if the attestation by the then reversioner could be construed as an assent to the transaction, “that consent by itself” would not be “sufficient to establish the existence of legal necessity,” and he relies on the case of *Bepin Behari Kundu v. Durga Charan Banerji* (2). That was, however, a case in which the next reversioner who gave the assent was a female and Mr. Justice Doss, who was a party to that case, said : “The result, no doubt, would have been different, if the next reversionary heirs . . . had not been females, but males, etc.” The learned Judge then refers to the case of *Sham Sundar Lal v. Achhan Kunwar* (3) and says, “this decision clearly shows that where a Hindu widow borrows money on mortgage of her husband’s estate, though the transactions may be concurred in or consented to by the next reversioner, such consent or concurrence,

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.

(1) (1909) 13 C. W. N. 544, 547.

(3) (1898) I. L. R. 21 All. 71 ;

(2) (1908) I. L. R. 35 Calc. 1086.

L. R. 25 I. A. 83.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.

cannot have the effect of conferring on the deed a larger operation than a mortgage of the limited interest only." I do not, however, understand the judgment of their Lordships to lay down that rule. Their Lordships say, "it is not a case in which all the kindred of Khairati have assented or could assent to the bonds or either of them and the circumstances are not such as, . . . , to raise any presumption from such concurrence as there was . . . that the transaction was a fair one or one justified by Hindu law. In order to raise such a presumption the consent . . . must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect." Their Lordships then show that there was no such consent, as both Achanbar and Enayat Singh were under the influence of Lalji Singh. Then the learned Judge says, "I think that the doctrine of surrender upon which the validity of a sale out and out of the whole or any portion of the inheritance with the consent of all the immediate reversioners is based cannot legitimately be extended to the case of a mortgage, etc.", and quotes the case of *Bajrangi Singh v. Manokarnika Bakhsh Singh*(1). In that case the widow had sold the property of her deceased husband piecemeal to her son-in-law, and the presumptive reversioners subsequently executed deeds one after another ratifying the sales. Their Lordships reviewed the several cases decided on the point and came to the conclusion that the consent of the whole body of persons constituting the next reversion, although subsequently given and not simultaneously, was sufficient for the validation of the alienation made by the widow. The first case considered was that of the *Collector of Masulipatam v. Cavalry Vencata Narrainapak* (2). That case decided that, "it may be taken as established that an alienation by her (the widow) which would not otherwise be legitimate may become so if made with the consent of her husband's kindred." The case of *Raj Lukhee Dabee v. Gokool Chunder Chowdhry* (3) decided that the consent must generally be by all those who are likely to be interested in disputing the transaction, and that at all events there must be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu law. Their Lordships then refer to the decision of the Allahabad High Court in *Ramphal Rai v. Tula Kuari* (4) which held that the presumptive reversioner could not by joining with the widow defeat the rights of the actual reversioner. Then their Lordships refer to the Full Bench case of

(1) (1907) I. L. R. 30 All. 1 ;

L. R. 35, I. A. 1.

(2) (1861) 8 Moo. I. A. 529 ;

2 W. R. (P. C.) 61.

(3) (1869) 13 Moo. I. A. 209 ;

3 B. L. R. (P. C.) 57.

(4) (1883) I. L. R. 6 All. 116.

*Nobukishore Sarma Roy v. Hari Nath Sarma Roy* (1). The ground of decision as put by Sir Richard Garth C. J. is then set out, "if it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being it seems impossible to prevent any alienation which the widow and the next heir may agree to make", and as set out by Mr. Justice Mitra, "but if the widow is competent to relinquish her estate to the next male heir of her husband, it follows as a logical consequence that she can alienate it merely with his consent without any legal necessity." This view is then shown to have been adopted by the Madras High Court in the case of *Marudamuthu Nadan v. Srinicasa Pillai* (2). The Bombay view is then set out in the words of Jenkins C. J. and Ranade J. that "the consent of the persons interested to oppose the transaction evidences its propriety, if not its actual necessity", and "the consent of the reversioners must be of such kindred the absence of whose opposition raises the presumption that the alienation was a fair and proper one". Their Lordships ultimately disapprove of the Allahabad view and agree with the view of the Calcutta High Court in *Radha Shyam v. Joy Ram* (3). It can hardly be said that their Lordships base their judgment on the so-called surrender theory. On the other hand, their Lordships seem to place more reliance on the presumption of necessity from the consent of persons interested for the time being in impeaching the alienation. The matter was considered by Norris and Banerjee JJ. in the case of *Hem Chunder Sanyal v. Saranamoyi Debi* (4). The learned Judges first refer to the express provisions of the Dayabhaga, in favour of an alienation in favour of certain relations. Dayabhaga XI, 1, 64. "In the disposal of property by gift or otherwise she is subject to the control of her husband's family." The word *danadi* in the text literally means gift and the like, and must therefore include sale and mortgage (see G. Sastri's Hindu Law, 448) and then continue:—"The text of the Dayabhaga referred to above evidently formed the basis of the earlier decision upholding the Hindu widow's alienation with the consent of the reversioners: see *Sreemutty Jadomoney Dabee v. Sarodaprosmo Mookerjee* (5); and then referring to the Full Bench case of *Nobukishore Sarma Roy v. Hari Nath Sarma Roy* (1) they say that the real ground of the Full Bench decision was that it would be wrong to upset a long course of decisions. It seems that the relinquishment theory was relied upon, not as the basis of the decision, but as an illustration of the higher powers of the Hindu widow which logically led

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.

(1) (1884) I. L. R. 10 Calc. 1102.

(4) (1894) I. L. R. 22 Calc. 354.

(2) (1898) I. L. R. 21 Mad. 128.

(5) (1856) 1 Boulnois 120;

(3) (1890) I. L. R. 17 Calc. 896.

3 I. D. (O. S.) 72.

1913  
 DEBI  
 PROSAD  
 CHOWDHURY  
 v.  
 GULAB  
 BHAGAT.

to the inference that she could sell with the consent of the reversioner. After *Bajrangji's case* (1) it was held in the case of *Pulin Chandra Mandal v. Balai Mandal* (2), that the alienation of a portion of her husband's estate by a Hindu widow with the consent of the next reversioner is valid. In the case of *Sankar Nath Mukerji v. Bejoy Gopal Mukerji* (3), it was held that a lease for 60 years by a Hindu widow which was ratified by the next reversioner was valid. If the so-called surrender theory was the basis of the rulings on the subject, alienation of the part of an estate of her husband by a widow would not be valid, nor would a lease be lasting beyond her life. It is true if there is a "surrender" or, more correctly, relinquishment, it must be of the whole: see *Behari Lal v. Madho Lal Akhri Gajawal* (4). But the validity of an alienation is founded on a different principle of Hindu law. In this view of the law I cannot agree with the view expressed in the case of *Hari Kissen Bhagat* (5) and agree in making this reference.

*Mr. S. P. Sinha* (with him *Babu Dwarkanath Chakrabarti* and *Babu Birajmohan Majumdar*), for the appellant. The essence of a mortgage is a loan. The law as to sales is not applicable to mortgages. It is true the property that stands as security for a mortgage-debt may continue to be liable even though the debt may be barred. But the property remains the mortgagor's. Consent of reversioner alone does not make a debt binding. Chatterji J. at least concedes in the order of reference that alienation by a widow depends on "surrender," that if it be a "surrender" it must be of the whole. The decision in *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (6) is based on that doctrine.

[*Dr. Ghose*. There the alienation was of a part.]

My contention is that the whole interest must be conveyed. "Surrender," as understood in English law, is somewhat different from what the word means

(1) (1907) I. L. R. 30 All. 1 ;  
 L. R. 35 I. A. 1.

(2) (1908) I. L. R. 35 Cal. 939.

(3) (1908) 13 C. W. N. 201.

(4) (1891) I. L. R. 19 Cal. 236 ;  
 L. R. 19 I. A. 30.

(5) (1909) 13 C. W. N. 544.

(6) (1884) I. L. R. 10 Cal. 1102.

here. As we understand it here, it means "acceleration" of the estate of the next taker by the withdrawal of the widow's interest in the property.

[JENKINS C.J. But see *Bajrangi Singh v. Manokarnika Bakhsh Singh* (1).]

In that case their Lordships held the consent of the kinsmen to be evidence of the *bond fides* of the transaction. That, moreover, was a case of sale. Their Lordships refused to extend the Bengal doctrine of *Nobokishore's* case (2) further, and to apply the rule of sale to mortgages would be to extend the operation of the Bengal doctrine.

It was held by the Privy Council in *Behari Lal v. Madho Lal Ahir Gayawal* (3) that the widow must withdraw her whole interest. A mortgage is not a case of withdrawal of the entire interest.

In *Bajrangi Singh v. Manokarnika Bakhsh Singh* (1) the whole estate was transferred, and the point decided was that consent of the reversioners after the transfer would not make it inoperative.

[MOOKERJEE J. Do you say that this case negatives the surrender theory?]

No. It only says that consent raises a presumption of legal necessity.

[MOOKERJEE J. How is this consistent with the surrender theory?]

They were dealing only with the questions as to the *quantum* of consent necessary and the proof of it.

[MOOKERJEE J. Why should those questions arise if the surrender theory were right?]

Sales of portions would be difficult to justify on the surrender theory. *Bairangi's* case (1) does not deal with the surrender theory at all. It merely

(1) (1907) I. L. R. 30 All. 1 ;  
L. R. 35 I. A 1.

(2) (1884) I. L. R. 10 Calc. 1102.

(3) (1891) I. L. R. 19 Calc. 236 ;  
L. R. 19 I. A. 30.

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.

1913  
 DEBI  
 PROSAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.

decides a rule of evidence. There the sales were sales of portions at different times, making up in all the whole property. In this case it was only a mortgage, and it makes no difference that it was a usufructuary mortgage. The safeguard against abuse of the rights of the life interest of the widow is absent in a mortgage. The doctrine of acceleration or surrender is useful in cases where, as here, no legal necessity is alleged.

In *Marudamuthu Nandan v. Srinivasa Pillai* (1) it was a case of a sale of a portion. Even in a sale of a part the widow withdraws her whole interest as to that part.

A consent of the reversioners to a mortgage would not of itself prove the existence of legal necessity. Whether the presumption of legal necessity arises from consent is a question of fact.

It is a significant fact that, except in the recent case of *Hari Kissen Bhagat v. Bajrang Sahai Singh* (2), there is no reported case of a mortgage. Therefore the uniform current of authority referred to in the argument in *Nobokishore's* case (3) does not help us in the present discussion. *Rangappa Naik v. Kamti Naik* (4) and *Muthuveeru Mudaliar v. Vythilinga Mudaliar* (5) decided after *Bajrang's* case (6) support my contention. See also *Pulin Chandra Mandal v. Bolai Mandal* (7). The presumption of propriety of transfer arising from consent is rebuttable.

A surrender by the Hindu widow in favour of the next reversioner of the whole interest is supported by Hindu law and authorities.

(1) (1898) I. L. R. 21 Mad. 128.

(2) (1909) 13 C. W. N. 544.

(3) (1884) I. L. R. 10 Calc. 1102.

(4) (1908) I. L. R. 31 Mad. 366.

(5) (1908) I. L. R. 32 Mad. 206.

(6) (1907) I. L. R. 30 All. 1 ;

L. R. 35 I. A. 1.

(7) (1908) I. L. R. 35 Calc. 939.

*Sreemutty Jadomoney Dabee v. Sarodaprosono Mookerjee* (1) discussed. The question there was whether conveyance of the whole interest was valid.

There are really two principles that can be deduced from these cases:—(i) that surrender of *whole* estate to the next heir or, with his consent, to a stranger, is a valid transfer, and (ii) alienation of whole or part must have justifying legal necessity. The consent of the reversioners is a piece of evidence: *Raj Lukhee Dabea v. Gokool Chunder Chowdhry* (2).

[JENKINS C.J. See Dayabhaga, Ch. XI. Is there not a third doctrine,—the doctrine of Narada?]

This is a Mitakshara case.

[JENKINS C.J. Are not there the words दानादि, etc.? How do you meet Narada's doctrine?]

That is a special case of gift to the kindred of a woman's father or mother. That is not the general law.

[JENKINS C.J. Begin at verse 26 of Chapter XI and read what follows for general scheme.]

The full power given to the husband's kinsmen by those verses does not mean power to dispose of the property in conjunction with the widow. The verse of Narada quoted there refers only to the perpetual tutelage of the woman. It does not authorize her to give to any but to her own father or mother's family. Kindred of husband mean others than next reversioners: see Dayabhaga, Ch. XI, vs. 56 and 62; Strange, vol. II, p. 409 at 410; *Kalee Mohun Deb Roy v. Dhumunjoy Shaha* (3), *Madhub Chunder Hajrah v. Gobind Chunder Banerjee* (4) and *Gunga Pershad Kur v. Shumbhoonath Burmun* (5).

(1) (1856) 1 Boulnois 120;  
3 I. D. (O. S.) 72.  
(2) (1869) 13 Moo. I. A. 209;  
3 B. L. R. (P. C.) 57.

(3) (1866) 6 W. R. 51.  
(4) (1868) 9 W. R. 350.  
(5) (1874) 22 W. R. 393.



1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.

*Babu Dwarkanath Chakrabarti* (following *Mr. Sinha*) refers to the original authorities. So far as the Dayabhaga is concerned, the rights of widows are dealt with in Ch. XI, sec. 1, verse 56 *et seq.* Reads verses 56 to 59. Verse 59 is the basis of the theory of surrender, and is a very important verse. Two other important verses are 63 and 64. They are a continuation of 61. Verse 64 introduces a limitation. There is no mention of reversionary heirs.

In dealing with the question of succession after the death of the widow, Jimutabahana says that it opens after her death. Sreekrishna speaks of her death, but Churamani adds "when the right ceases." From these words the theory of acceleration of the reversioner's right by surrender is based. The original texts therefore give no support to the theory of surrender.

Section 61 only provides for gifts or other alienations by the widow for the spiritual benefit of the husband. Section 62 provides for alienation for legal necessity. Section 63 says that the widow may make gifts to the husband's kindred at the husband's obsequies, but prohibits any such gifts to her own kindred. But verse 64 says that gifts to her own kindred may be made with the consent of her husband's kindred. It is clear, therefore, that the Dayabhaga nowhere authorises any alienation with the consent of the revisioners. Verse 64 would be no authority for such a proposition.

Then, Narada denies all rights to the widow in her husband's property. See Jolly's edition, Ch. XIII, verses 25 to 29. Verse 28 says that the husband's kins are her guardian, and that they have power in disposing of *her* and not of her *husband's property*. The text of Narada does not support the view of the Dayabhaga in verse 64—"In disposal of property by gift or otherwise she is subject to the control of her

husband's family." But the Dayabhaga was the champion of the widow's rights, and was the exponent of the progressive view of the times.

The two principles of surrender and alienation with the consent of kindred are based on texts. The question is, how far that ancient idea is kept up. A widow may retire in favour of the reversioner. As far as the texts go, she cannot alienate to any but the reversioner. *Nobokishore Sarma Roy v. Harinath Sarma Roy* (1) goes beyond the text: see the remarks of Garth C.J. in that case. The case law has gradually extended the doctrine illogically: see Mitter J.'s judgment. They invoke fictions. The Bombay High Court proceeds on a different basis: it takes it only as evidence. The Privy Council in *Bajrangi's* case (2) says that all Courts agree in attaching certain consequences to the consent of the reversioners. They do not go to expound the orthodox theory. *Behari Lal v. Madho Lal Ahir Gayawal* (3) is a Bengal case, and their Lordships clearly proceed on the theory of acceleration by surrender. They dismissed the claim because the entire bar of life estates had not been removed. A mortgage is not a surrender of the whole estate.

[JENKINS C.J. Property must vest in an heir or, if she is a widow, we say the heir for the time being. I can understand her ceasing to be a heir by civil death or by executing a disclaimer. In that case the estate must vest in the reversioner. But I can't understand her ceasing to be heir by asserting her heirship in the act of transfer.]

Mitakshara, Ch. II, sec. 1 (Stoke's ed., p. 431). Texts of Narada or Vrihaspati are not used by Mitakshara. There is no para in Mitakshara authorizing the widow

(1) (1884) I. L. R. 10 Calc. 1702.

(3) (1891) I. L. R. 19 Calc. 236 ;

(2) (1907) I. L. R. 30 All. 1 ;

L. R. 19 I. A. 30.

L. R. 35 I. A. 1.

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.

to alienate as the Dayabhaga does. The Dayabhaga is of a later stage.

[*Dr. Ghose*. But see Ch. II, sec. 1, verses. 5 and 6.]

Those verses do not say anything as to widow's rights. The Mitakshara gives no right so long there are any males.

Therefore, from the texts a surrender is possible only of the entire estate. *Nobokishore's* case (1) perhaps makes some difference. The decision in *Behari Lal's* case (2) was based on surrender. That is why we do not find cases, except only recently, of mortgages.

As to consent, original texts deal with kinsmen only and not reversioners. If all kinsmen join, there is very good and cogent evidence. In *Raj Lukhee's* case (3), the Privy Council had to deal with the consent of the husband's kindred, and treats the consent as evidence of necessity only. That was no case of surrender. The consenting party was no reversioner.

In *Bairangi's* case (4) practically all kinsmen joined.

The case of surrender is one question, propriety is another. Evidence of legal necessity is therefore necessary when the question of propriety comes.

Here there is no finding of legal necessity.

*Dr. Rashbehary Ghose* (with him *Babu Umakali Mukherji*, *Babu Mahendra Nath Roy*, *Babu Upendra Nath Chatterji* and *Babu Nareshchandra Singha*), for the respondent. A mortgage is an alienation. There is great danger in reversing a concurrent course of decisions. It would disturb thousands of titles. It may not be easy to formulate the basis on which the series of decisions rest.

(1) (1884) I. L. R. 10 Cal. 1102.

(3) (1869) 13 Moo. I. A. 209, 228 ;

(2) (1891) I. L. R. 19 Cal. 236 ;

3 B. L. R. (P.C.) 57.

L. R. 19 I. A. 30.

(4) (1907) I. L. R. 30 All. 1 ;

L. R. 35 I. A. 1.

These cases rest apparently on the ground that under the Hindu law the widow and the next reversioners represent the entire inheritance. I am not now discussing acceleration. For some purposes they undoubtedly represent all. Take a suit by a mortgagee. Who are the parties? See *Srinath Dass v. Hari Pada Mitter* (1) which relied on *Nugenderchunder Ghose v. Kaminee Dossee* (2) and *Mohima Chunder Roy Chowdhry v. Ram Kishore* (3). Take another case—a suit under article 118 of the Limitation Act. There is no doubt a conflict of decisions: see *Shrinivas Murar v. Hanmant* (4), *Pulin Chandra Mandal v. Bolai Mandal* (5) and *Ayyodorai Pillai v. Solai Ammal* (6).

These cases may also be supported on the principle that, apart from any question of legal necessity, alienation by a widow with the consent of the next heir is a valid transaction. There is, moreover, the ground that a court is *bound to presume*, notwithstanding the *dictum* in *Raj Lukhee's* case (7), that a transaction entered into by a widow with the consent of the next heir is a legitimate transaction. It is not at all necessary to presume legal necessity or to find that the purchaser made *bona fide* enquiry before purchase. In *Bajrangi's* case (8), there was no legal necessity at all—not even the pretence of one. There was neither a surrender of the whole estate at a time.

There has been a divergence of opinion between some of the High Courts as to gifts. I would not, therefore, put it on the ground of the presumed

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.

(1) (1899) 3 C. W. N. 637.

(5) (1908) I. L. R. 35 Cal. 908.

(2) (1867) 11 Moo. I. A. 241.

(6) (1901) I. L. R. 24 Mad. 405.

(3) (1875) 23 W. R. 174.

(7) (1869) 13 M. I. A. 209 ;

(4) (1899) I. L. R. 24 Bom. 260.

3 B. L. R. (P.C.) 57.

(8) (1907) I. L. R. 30 All. 1 ; I. L. R. 35 I. A. 1.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.

existence of legal necessity, but on the ground that a Court is bound to presume it to be a valid transaction.

Whether the judgment of the Judicial Committee in *Rajrangji's* case (1) is sound or not, it is binding on us. Quite apart from that case, just look at the series of cases in Bengal. Even in Sir Richard Garth's time it was felt that a decision contrary to the fixed law at the time would have upset many titles. In 1913 it would be still more disastrous.

In *Jadomoney Dabee v. Sarodaprosono Mookerjee* (2) the decision was based not on the ground of surrender, but whether there was sufficient representation or not. The original texts speak only of the *consent of the heirs*. "Heirs" does not mean all possible heirs.

The Full Bench case of *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (3) refers to the case of *Trilochun Chuckerbutty v. Umesh Chunder Lahiri* (4), in which the sale was a sale of only portions.

The Calcutta High Court has consistently followed the same principle, rightly or wrongly: *Mohunt Kishen Geer v. Busgeet Roy* (5), *Raj Bullubh Sen v. Oomesh Chunder Roop* (6). After the Full Bench case we have *Annada Kumar Roy v. Indra Bhusan Mukhopadhyaya* (7), and *Bepin Behari Kundu v. Durga Charan Banerji* (8). In the last mentioned case, there was only the consent of the daughters.

[MOOKERJEE J. But Maclean C.J. referred to the presumption.]

The question did not really arise, and as to that see *Annada Kumar Roy v. Indra Bhusan*

(1) (1907) I. L. R. 30 All. 1 ;

L. R. 35 I. A. 1.

(2) (1856) 1 Boulois 120 ;

3 I. D. (O. S.) 72.

(3) (1884) I. L. R. 10 Calc. 1102.

(4) (1880) 7 C. L. R. 571.

(5) (1870) 14 W. R. 379.

(6) (1878) I. L. R. 5 Calc. 44.

(7) (1907) 12 C. W. N. 49.

(8) (1908) I. L. R. 35 Ca. c. 1086.

*Mukhopadhyaya* (1), *Pulin Chandra Mandal v. Bolai Mandal* (2), *Sankar Nath Mukerji v. Bejoy Gopal Mukerji* (3).

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT

[MOOKERJEE J. They then accept the surrender theory.]

I profess I am unable to reconcile the various theories upon which the alienations in the several cases have been supported. But the rule is there and it is too late in the day to upset it: *Hem Chunder Sanyal v. Sarnamoyi Debi* (4).

In the last mentioned case Banerjee J. also refers to *Behari Lal's* case (5).

The transfer of the whole and the transfer of a part with consent stand on the same footing.

Their Lordships in *Jadomoney's* case (6), pointed out that if the consent of every one who stood in the line of succession were necessary, no alienation would ever be possible.

The real ground of *Nobokishore's* case (7) was the long course of decisions.

In answer to *Radha Shyam Sircar v. Joy Ram Senapati* (8), I place the decision in *Bajrang's* case (9), where it has been held that in some cases the consent of all may be waived.

In *Behari Lal v. Madho Lal Ahir Gayawal* (5) the question was, whether or not a grandson who was in existence at the date of the transaction by the widow was entitled to succeed to the exclusion of a grandson born subsequently. That would depend on whether or not the widow had made a surrender so

- |                                    |  |
|------------------------------------|--|
| (1) (1907) 12 C. W. N. 49.         | (6) (1856) 1 Boulnois, 120 ;             |
| (2) (1908) I. L. R. 35 Calc. 939.  | 3 I. D. (O. S.) 72.                      |
| (3) (1908) 13 C. W. N. 201.        | (7) (1884) I. L. R. 10 Calc. 1102.       |
| (4) (1894) I. L. R. 22 Calc. 354.  | (8) (1890) I. L. R. 17 Calc. 896, 900 n. |
| (5) (1891) I. L. R. 19 Calc. 236 ; | (9) (1907) I. L. R. 30 All. 1 ;          |
| L. R. 19 I. A. 30.                 | L. R. 35 I. A. 1.                        |

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.

as to accelerate the estate of the then reversioner. It was held that there had been no acceleration. Their Lordships were not discussing the question that is before you, viz., whether a transfer made by a widow with the consent of the next reversioner is valid or not. I do not dispute for a moment that to accelerate the estate the widow must commit a "moral suttee" so to say, *i.e.*, cease to be an heir.

[JENKINS C.J. Is it the fact that their Lordships in *Nobokishore's* case (1), refused to disturb the long course of decisions, or they only said that consent is necessary, but they did not precisely say what *quantum* of consent is wanted ?]

It was laid down there that a transfer made with consent would give a complete title to the transferee that cannot be challenged in any way. If the question of consent or legal necessity could be gone into, the purchaser's title would be precarious. Suppose the reversioner dies before the widow.

[JENKINS C.J. But let us look to the exact question formulated in the reference.]

The Subordinate Judge in *Nobokishore's case* (1) found that there was no justifying legal necessity. The whole point is whether the presumption of necessity arising from consent is rebuttable or not. I say it is irrebuttable. Mr. Sinha says it is rebuttable.

I can understand the judgment of Doss J. in *Hari Kissen Bhagat v. Bajrang Sahai Singh* (2) that if a sale of a part would not be binding on the other reversioners, it would not be binding in the case of a mortgage, but I do not understand why, if it be binding as to whole in sales, it would not be binding in the case of a mortgage. This judgment has really caused the reference. On this point I again rely

(1) (1884) I. L. R. 10 Cal. 1102.

(2) (1909) 13 C. W. N. 544.

on *Hem Chunder Sanyal v. Sarnamoyi Debi* (1), which is really in my favour.

[JENKINS C.J. If you say that relinquishment is another term for surrender how can you say that transfer of a part is valid?]

In *Trilochun Chuckerbutty v. Umesh Chunder Lahiri* (2) the transfer was of a part: see also *Nobokishore's case* (3). *Marudamuthu Nadan v. Srinivasa Pillai* (4) is undoubtedly against me. But see *Rangappa Naik v. Kamti Naik* (5) and *Muthuveeru Mudaliar v. Vythilinga Mudaliar* (6). The Bombay cases *Ramkrishna Kuppuswami v. Tripurabai* (7) and *Hunsrai Morarji v. Bai Moghibai* (8) are also really in my favour.

After the decision of the Judicial Committee in *Bairangi's case* (9), the Madras decisions cited above cannot count for much.

The Allahabad High Court evidently does not follow *Bairangi's case* (9), though it must. It follows its older decision in *Ramphal Rai v. Tula Kuari* (10) which the Privy Council has overruled. In *Bakhtawar v. Bhagwana* (11), the Privy Council case is distinguished, as the Allahabad case was one of gift.

The judgment of the Judicial Committee rests on a proposition which is deducible from the current of cases and from Hindu law, and that is that a transfer by a widow with the consent of the kinsmen is valid. The only question is what is the amount of consent that is necessary. The Allahabad High Court wants it to be the consent of all kinsmen and not merely

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.

(1) (1894) I. L. R. 22 Calc. 354.

(7) (1911) 13 Bom. L. R. 940.

(2) (1880) 7 C. L. R. 571.

(8) (1905) 7 Bom. L. R. 622, 632.

(3) (1884) I. L. R. 10 Calc. 1102.

(9) (1907) I. L. R. 30 All. 1 ;

(4) (1898) I. L. R. 21 Mad. 128.

L. R. 35 I. A. 1.

(5) (1903) I. L. R. 31 Mad. 206.

(10) (1883) I. L. R. 6 All. 116.

(6) (1908) I. L. R. 32 Mad. 206.

(11) (1910) I. L. R. 32 All. 176.



1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.

of the next reversioner: *Abdulla v. Ram Lal* (1). That also is a case of gift.

Before *Bairangi's* case (2) it was uncertain as to the consent of which of the kindred is necessary. The Privy Council really adopted the view of *Jadomoney's* case (3).

[JENKINS C.J. This is an alienation of a part.]

It does not matter. I contend that whether the view taken in *Nobokishore's* case (4) is right or wrong, it is the settled law, and it would be disastrous to alter it now. I also contend that consent of the next reversioner is sufficient as the consent of kinsmen.

[JENKINS C.J. If *Nobokishore's* case (4) be excluded as debateable, I do not find any case where it has been held that consent without legal necessity validates alienation.]

*Trilochun Chuckerbutty v. Umesh Chunder Lahiri* (5), *Mohunt Kishen Geer v. Busgeet Roy* (6), *Hem Chunder Sangal v. Sarnamoyi Debi* (7), and *Annada Kumar Roy v. Indra Bhusan Mukhopadhyaya* (8). All these were cases before *Bairangi's* case (2).

*Pulin Chandra Mandal v. Bolai Mandal* (9) is also a case in point. In *Bepin Behari Kundu v. Durga Charan Banerji* (10) Dr. Sen had to rely on the consent of the daughters as evidence. The case is distinguishable.

The real basis of the long current of Bengal judgments must be presumed to be that the widow and the next reversioner together represent the whole

(1) (1911) I. L. R. 34 All. 129.

(5) (1880) 7 C. L. R. 571.

(2) (1907) I. L. R. 30 All. 1 ;

(6) (1870) 14 W. R. 379.

L. R. 35 I. A. 1.

(7) (1894) I. L. R. 22 Calc. 354.

(3) (1856) 1 Boulois 120 ;

(8) (1907) 12 C. W. N. 49.

3 I. D. (O. S.) 72.

(9) (1908) I. L. R. 35 Calc. 939.

(4) (1884) I. L. R. 10 Calc. 1102.

(10) (1908) I. L. R. 35 Calc. 1086

inheritance: see also Narada's text in Ch. XI, sec. 1, verse 64 of Dayabhaga, and Dayacrama, Ch. I, sec. 2, para. 7.

In *Jadomoney's* case (1) the Judges dealt with most of the earlier cases. Some of these are: *Hemchund Mijoomdar v. Mussummaut Tara Munnee* (2), *Gocul Chund Chuckerwurttee v. Mussummaut Raj-rance* (3), *Brindabun Chund Rai v. Bishun Chund Rai* (4) and *Agund Race v. Rughoonath Sahye* (5). In *Gocul Chund's* case (3) it was held that the consent of the reversioner is necessary only if there is no legal necessity. That case also states what is meant by "reversioner."

[JENKINS C.J. That was a case where the entire estate was transferred].

In *Jadomoney's* case (1), Colville C. J. speaks of transfer of a part at p. 131.

[JENKINS C.J. That contemplates gift to husband's or wife's kinsmen.]

All these cases are summarized and discussed in Dr. Mitra's Tagore Law Lectures for 1879 at p. 372 *et seq.*, and Mayne's Hindu Law (7th Ed.), p. 855.

In *Collector of Masulipatam v. Canaly Vencata Narrainapah* (6), their Lordships say: "it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred." There is no question of presumption, far less of rebuttable presumption. The rule as to the evidentiary value of consent is common sense.

- |  |   |
|--|---|
| (1) (1856) 1 Boulnois 120 ;<br>3 I. D. (O. S.) 72.             | (4) (1826) 4 Mac. Sel. Rep. 180 ;<br>7 I. D. (O. S.) 134. |
| (2) (1811) 1 Mac. Sel. Rep. 481,<br>484 ; 6 I. D. (O. S.) 352. | (5) (1835) 6 Mac. Sel. Rep. 37 ;<br>7 I. D. (O. S.) 693.  |
| (3) (1816) 2 Mac. Sel. Rep. 213 ;<br>6 I. D. (O. S.) 521.      | (6) (1861) 8 Moo. I. A. 529, 551 ;<br>2 W. R. (P. C.) 61. |

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BRAGAT.

[JENKINS C.J. There their Lordships take it as a fact that could be presumed.]

As a matter of course, but not as matter of rebuttable presumption.

[JENKINS C.J. You rather misread the word "may." It is not "must".]

They say later on, "*must* be proper."

*Raj Lukhee Dabee v. Gokool Chunder Chowdhry* (1) strikes a discordant note when it says: "Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction." Well, the difficulty in India is to make out the next reversioner; that difficulty is got over, and the conflict of law is settled in *Bajrangji's* case (2). If that case is good law, it is not merely a question of presumption. You are bound to follow the latest Privy Council case.

In *Vinayak Vithal Bhange v. Govind Venkatesh Kulkarni* (3) it was held that the consent of all and every reversioner is not necessary.

It is difficult to appreciate the application of the principle of acceleration by the Calcutta High Court, if the only question was one of presumption. The quotation of texts would have been quite unmeaning then.

See *Govindchund Bysack v. Cossinaut Bysack* (4) in Shamacharan Sarkar's *Vyavastha Darpan*, Volume II, p. 41, which is referred to in *Jadomoney's* case (5).

(1) (1869) 13 Moo. I. A. 209, 228; (4) (1826) Montr. H. L. C. 477;

3 B. L. R. (P.C.) 57.

1 I. D. (O.S.) 292.

(2) (1907) I. L. R. 30 All. 1;

(5) (1856) 1 Boulnois 120;

L. R. 35 I. A. 1.

3 I. D. (O.S.) 72.

(3) (1900) I. L. R. 25 Bom. 129.

In *Bajrangī's* case (1), there were successive deeds. For the facts of the case see the reports in the Allahabad Series.

[JENKINS C.J. All those together make up the whole estate and the reversioners give their consent by one deed.]

Yes, but that does not make any difference in law: see the arguments in *Bajrangī's* case (1). Their Lordships say the High Courts were agreed as to the "general principle".

In *Ramphal Rai v. Tula Kuari* (2), they were dealing with consent of the reversioner. It was challenged by a remote kinsman.

Their Lordships in *Bajrangī's* case (1) followed the Calcutta High Court and disapproved of the Allahabad decision.

See also *Rangappa Naik v. Kamti Naik* (3) and *Vinayak Vithal Bhange v. Govind Venkatesh Kulkarni* (4), per Ranade J.

[MOOKERJEE J. Up to a certain point, there is no difficulty or difference.

We come back to *Bajrangī's* case (1) again.

[JENKINS C.J. See *Radha Shyam Sircar v. Joy Ram Senapati* (5).]

That was a case of alienation of a part of the estate without the consent of all near reversioners.

[JENKINS C.J. On the question of estoppel, and *spes successionis* have you seen *Bahadur Singh v. Mohar Singh* (6)?]

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT

(1) (1907) I. L. R. 30 All. 1 :

L. R. 35 I. A. 1.

(2) (1883) I. L. R. 6 All. 116.

(3) (1908) I. L. R. 31 Mad. 366; 375.

(4) (1900) I. L. R. 25 Bom. 129.

(5) (1890) I. L. R. 17 Cal. 896, 900.

(6) (1901) I. L. R. 24 All. 94, 107.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.

But see Colville C.J.'s judgment in *Jadomoney's* case (1). It does not matter whether it is the whole or part.

This reference has not been made because there is any decision that such a transfer would be invalid, but because of Doss J.'s decision (2), in which he holds that sale is different from mortgage.

[STEPHEN J. Is there any question here of a difference between Dayabhaga and Mitakshara?]

No. In any case, it is all in my favour. This question is elaborately discussed in G. Sarkar's Hindu Law, pp. 416 and 417.

The old cases referred to by my opponent support the existence of lawful purpose or justifying cause. For example, *Kalee Mohan Deb Roy v. Dhunioy Shetha* (3). It is held there that "in the absence of any fraud", consent is good evidence of the *bonâ fides* of the alienee. Even if the consent is not cogent evidence, which I contend it is, it plainly shows that the alienee acted in good faith. It is conclusive. In this case, my client paid off some prior debts, and other prior debts were also paid from the mortgage money. See *Madhub Chunder Hairah v. Gobind Chunder Banerjee* (4).

Doss J. was wrong in reading *Achhan Kunwar's* case (5) in the way he did.

*Mr. Sinha*, in reply: If this transaction can be upheld upon texts, upon logical deduction from them, or on case-law, there is nothing to be said. But it cannot be so upheld.

It is conceded that sales of portions cannot be supported by the doctrine of acceleration. In such

(1) (1856) 1 Boulois 120 ;

3 I. D. (O.S.) 72.

(2) (1907) 13 C. W. N. 544.

(3) (1866) 6 W. R. 51.

(4) (1868) 9 W. R. 350.

(5) (1898) I. L. R. 21 All. 71 ;

L. R. 25 I. A. 183.

cases you must prove legal necessity. We have been told that the texts authorize alienation of portions to husband's kindred. But when? Only at the funeral of the husband, or at other times for spiritual benefit. A sale of a portion to a stranger for money cannot confer such a benefit.

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.

There is no current of authority in cases of mortgage.

Whether there was necessity is a matter of evidence. Consent may be evidence, but not conclusive by itself. The widow may recite in the deed of transfer a purpose that is not justifiable. Certainly the consent of the reversioners would not validate the transfer.

I am prepared to argue that the earlier cases holding that sales of portions were valid were wrongly decided. Why extend such a doubtful principle to mortgages? We should always bear in mind the warning in *Bajrangji's* case (1) that the principle should not be extended indiscriminately.

*Curr. adv. vult.*

JENKINS C. J. The question submitted for the determination of this Full Bench is in these terms:

"Is the alienation, by way of mortgage by a Hindu widow of a portion of the estate of her husband, without any proved legal necessity, but with the consent of the next reversioner for the time being, valid and binding on the actual reversioner who is not the heir of the consenting reversioner?"

The husband in this case died without male issue and the widow became, and at the date of the alienation still was, his heir.

A widow's power of alienation for purely worldly purposes over her sonless husband's estate has been

(1) (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.

1913  
 DEBI  
 PROSAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 ———  
 JENKINS C.J.

a constant theme of discussion, and in some respects it has been placed beyond the possibility of further argument.

Thus it may be taken as settled beyond dispute that she can alienate for legal necessity either the whole or a part of her deceased husband's estate, and that even in the absence of such necessity the alienee's title will prevail if he made reasonable enquiry and acted in the honest belief that such necessity existed. But the problem how far apart from this she can alienate merely with the consent of her husband's kindred is beset with difficulty.

A multitude of authorities bearing on this point has been cited to us; and though I have considered them all I propose to refer only to a few in expressing my opinion on the question submitted for our determination.

In 1826 a Hindu widow's position was considered by the Privy Council, and Lord Gifford in delivering their Lordships' opinion said of her, "she is entitled to the possession of the property, but that she is only entitled to enjoy it according to the rights of a Hindu widow which it appears to me to be absolutely impossible to define—I mean the extent and limit of her power of disposing of it; because it must depend upon the circumstances of that disposition, whenever such disposition shall be made, and must be consistent with the law regulating such dispositions": *Govindchund Bysack v. Cossinaut Bysack* (1).

In the *Collector of Masulipatam v. Cavalry Vencata Narrainapah* (2) decided in 1861, it was said at page 551 of a Hindu widow that "for religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a

(1) (1826) Montrion's H. L. C. 477;      (2) (1861) 8 Moo. I. A. 526;  
 1 I.'D. (O. S.) 292, 309.                      2 W. R. (P. C.) 61.

larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. . . . The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper".

The case of *Raj Lukhee Dabee v. Gokool Chunder Chowdhry* (1) came before the Privy Council in 1869 on appeal from the High Court at Fort William in Bengal. The transaction in controversy was a sale by a widow, the deed of conveyance being executed by her and attested by one Juggut Ram. The High Court held that the consent of Juggut Ram, unquestionably given at the time of the sale and against his own obvious interests, was a very strong piece of evidence in favour of the purchaser, as Juggut Ram was then the sole heir and reversioner, and, at the date of the sale, was the person most likely to know the real state of the case and the urgent necessities of the widow. In delivering the opinion of the Privy Council Sir James Colville, dealing with this question of consent, said: "Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair

1913  
DEBI  
PROBOD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.  
JENKINS C.J.

(1) (1869) 13 Moo. I. A. 209; 3 B. L. R. (P. C.) 57.



1913  
 DEBI  
 PROSAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 JENKINS C.J.

one, and one justified by Hindu Law. That it can be, as Mr. Field seemed to put it, a presumption of law in the sense of *praesumptio juris et de jure*, their Lordships do not think. It is, no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction."

Their Lordships, after expressing their inability to affirm that Juggut had concurred in the deed, and their opinion that he was not proved to have been the next heir, then proceed as follows: "On the other hand, the very fact of his connection with the family leads to the presumption that he knew that the present appellant had the power given to her by her husband to adopt a child, and that, therefore, his interest, even if it existed, as next reversioner, was in all probability likely to be defeated. Therefore, if his concurrence were proved, it would not amount to such a concurrence by the husband's kindred as, in the opinion of their Lordships, would have defeated the plaintiff's claim." Then after pointing out that no issue as to concurrence had been raised in the pleadings or in earlier stages of the cause, they say: "The case of the party who sought to support the validity of this transaction was, that the sale had been made for particular purposes. He gave no evidence of that. He did not, by any suggestion in his written statement or otherwise, put forward the concurrence of Juggut Ram, either as supplying the want of proof of the existence of the debts and the necessity of the sale, or as a consent equivalent to such proof."

In *Sham Sundar Lal v. Achhan Kunwar* (1) Lord Davey, delivering their Lordships' opinion, says: "To give validity to the bonds . . . the plaintiffs . . . must show that there was legal necessity

(1) (1898) I. L. R. 21 All. 71 ; L. R. 25 I. A. 183.

for raising the money by a charge on Khairati's estate, or at least that in advancing their money the creditors gave credit on reasonable grounds to representations that the money was wanted for such necessity. It is not a case in which all the kindred of Khairati have assented or could assent to the bonds, or either of them, and the circumstances are not such as, in the opinion of their Lordships to raise any presumption from such concurrence as there was of Achhan Kunwar and Inayet Singh in the first bond, or of Inayet Singh in the second bond that the transaction was a fair one or one justified by Hindu law. In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing, and an intelligent intention to consent to such effect."

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.  
JENKINS C.J.

The law as enunciated by their Lordships in these cases is clear; the difficulty is occasioned by a decision of a Full Bench of this Court in *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (1), where an answer in the affirmative was given to the question, "whether, according to the law current in Bengal, a transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer being assented to by the person who at the time is the next reversioner will conclude another person not a party thereto who is the actual reversioner upon the death of the widow from asserting this title to the property?"

This decision rests on the theory of an acceleration of the next heirs' interest occasioned by the widow's relinquishment in his favour.

The reasoning in effect is this: it is only the widow's interest that stands in the way of the next heir's succession; that obstacle is removed by the

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAT  
 BHAGAT.  
 —  
 JENKINS C.J.

determination of the widow's interest: the determination can be effected by her death, civil or natural, by disclaimer at the husband's death, and so by relinquishment later.

In English law, it is true, a disclaimer by an heir will have no effect; all he can do is to dispose of his inherited property by an ordinary conveyance, but *Nobokishore's* case (1) appears to lay down a different rule, at any rate for a Hindu widow.

But as there cannot be a disclaimer of a part, so the relinquishment must be of the whole, for it is only by a total relinquishment that the condition of the heirship can be determined: *Moazam Hassain Chowdhuri v. Bhouldin* (2).

It was suggested by the respondent that in *Nobokishore's* case (1) the dealing was with a part of the property, and, as supporting this, reliance was placed on the language of Banerjee J. in a later case. But there is nothing in the report of *Nobokishore's* case (1) that supports this view, and an examination of the original record in no way helps the respondent's contention. Moreover, it is opposed to the line of reasoning on which the decision rests. This view is in accord with the language of the Privy Council in *Behari Lal v. Madho Lal Ahir Gayawal* (3), where it was said in appeal from Bengal: "It may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances."

(1) (1884) I. L. R. 10 Cal. 1102.

(2) (1900) 5 C. W. N. 189.

(3) (1891) I. L. R. 19 Cal. 236 ;  
 L. R. 19 I. A. 30.

Starting then from the established position that the next heir's succession can be accelerated by relinquishment, it was determined in *Nobokishore's* case (1) as a logical consequence that the widow, with the next heir's consent, could alienate without any necessity.

But if logic is to have any place, the alienation so sanctioned must be of the entire estate. How far it can be said that the doctrine of acceleration consequent on relinquishment applies where the widow retains an interest in the purchased price, or the sale is little more than a change of investment, it is difficult to say; the cases do not refer to this. The road to the decision in *Nobokishore's* case (1) was not without its difficulties, but the learned Judges felt it had to be travelled that titles might be quieted. But it is settled that there should be no extension of this Bengal doctrine: *Bajrangi Singh v. Manokarnika Bakhsh Singh* (2).

Much reliance has been placed on this last decision of the Privy Council by the respondent in the argument before us, and Dr. Rashbehary has even contended that it is conclusive in his favour. There, by successive instruments, a widow purported to transfer for valuable consideration to her son-in-law the whole estate of her deceased husband whose heir she was. Subsequently the consent of the nearest reversionary heirs was obtained, but they predeceased the widow. This consent took the form of a relinquishment embodied in two deeds. The transaction was impugned by those who, at the widow's death, were the next heirs, and the question raised was whether the "deeds confirming the sales by the widow to Maheshar,

1913

DEBI  
PRONAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.

JENKINS C.J.

(1) (1884) I. L. R. 10 Calc. 1102.

(2) (1907) I. L. R. 30 All. 1 ;  
L. R. 35 I. A. 1.

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.

JENKINS C.J.

executed by the then nearest reversioners, and disclaiming all title to the property in dispute, were binding on their descendants, the appellants, who were the nearest reversioners at the time when the succession opened, at the widow's death" (1). No new principle was formulated; that already established by prior decisions was applied to a novel set of facts.

The judgment, after stating that the principle is admitted, points out that the only question remaining for determination was the *quantum* of consent necessary. On this, the stricter doctrine of Allahabad was rejected in favour of the more tolerant view that ordinarily the consent of the whole body of persons constituting the next reversioners should be obtained, though there might be cases in which special circumstances might render the strict enforcement of this rule impossible.

At the same time it was distinctly said that their Lordships would be unwilling to extend the widow's power of alienation beyond its present limit.

The result, then, of the authorities binding on us appears to me to be this. To uphold an alienation by a widow of her deceased husband's estate where she is his heir it should be shown—(i) that there was legal necessity, or (ii) that the alienee, after reasonable enquiry as to the necessity, acted honestly in the belief that it existed, or (iii) that there was such consent of the next heirs as would raise a presumption, either of the existence of necessity, or of reasonable inquiry and honest belief as to its existence, or (iv) that there was a consent of the next heirs to an alienation capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and consequent acceleration of the interest of the consenting heirs. Where any one of the first

(1) (1907) I. L. R. 30 All. 1, 14.

three positions is established, the alienation may be of the whole or any part of the husband's estate; but where the fourth alone is proved, then the alienation must be of the whole.

Here the alienation is only of a part of the husband's estate, and that by way of mortgage, so that the fourth position cannot apply.

I would therefore answer the question propounded by saying that the alienation by way of mortgage by a Hindu widow as heiress of a portion of the estate of her deceased husband, without proof either of legal necessity or of reasonable enquiry, and honest belief as to its existence, but with consent of the next reversioner, for the time being, will be valid and binding on the actual reversioner if the presumption of legal necessity or of reasonable enquiry and honest belief raised by such consent is not rebutted by more cogent proof.

The case must be returned to the Division Bench for disposal in accordance with this answer to the reference.

HARINGTON J. The question in this reference is: "Is the alienation by way of mortgage by a Hindu widow of a portion of the estate of her husband without any proved legal necessity, but with the consent of the next reversioner for the time being, valid and binding on the next reversioner who is not the heir of the consenting reversioner?"

The question whether the widow can dispose of the whole of the estate of her deceased husband, with the consent of the next reversioner for the time being, must be regarded as having been settled as far back as 1884 by a Full Bench of this Court, in the case of *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (1).

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.  
JENKINS C.J.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 ———  
 HARRINGTON  
 J.

But, in that case, the decision does not appear to be based on any principle of Hindu law, it rather proceeds on the ground that there had been a long series of decisions affirming this proposition, and that many sales had taken place and titles had been accepted on the faith of these decisions which it would be unjust to disturb. And although the Chief Justice describes the transaction as a relinquishment rather than a surrender, the decision can hardly be placed on that ground. No doubt when a woman becomes incapable of holding property by physical death, or by entering a religious order, she relinquishes her husband's estate: this can hardly be said to be the case when she converts his estate into money and continues in the enjoyment of it in another form.

The views of the various High Courts in India on the question of alienations by a widow were considered by the Judicial Committee in 1907, in the case of *Bajrangi Singh v. Manokarnika Balhsh Singh* (1), in which, without pronouncing an opinion as to the grounds on which the principle is to be placed, their Lordships say, the principle being admitted by the High Courts in India, the *quantum* of consent has to be considered.

The result of these two decisions, which are both binding on us, is to establish that a widow can, without proof of legal necessity, alienate the whole of her husband's estate with the consent of the then next reversioner. But they leave the principle on which such alienations are to be supported open—the Full Bench being decided on the ground that it would be unjust to disturb what had been settled by a long series of decisions, while the Judicial Committee affirm that the principle is admitted, but do not say on what ground it is to be taken as established.

(1) (1907) I. L. R. 30 All. 1 ; L. R. 35 I. A. 1.

It is contended by the appellant that the widow's power to make a title to a portion of her husband's estate cannot be placed on the ground that she has a power to relinquish. but that to justify a sale or mortgage of a portion of the estate there must be legal necessity, and that the consent of the then reversioner is, at its highest, only evidence that legal necessity existed, or at any rate that the transaction was a proper one; while for the respondent it is contended that the widow and the reversioner, for the time being, represent the estate and are able to make a good title to the whole or any part of it, or to mortgage it or any part of it, so as to bind those who happen to be the heirs of the deceased husband at the widow's death.

The former view is supported by the case of *Behari Lal v. Madho Lal Ahir Gayawal* (1), which was decided by Privy Council in 1891. This was, however, a case of a peculiar character. The widow did not convey out and out to the next reversionary heir, but gave the estate to him subject to her having the estate for life. Before the widow died another reversionary heir had come into existence, and it was held that the *ekrarnama* executed by the widow could not operate to defeat that reversioner.

But the conveyance passed no estate in possession at the time it was executed. It was not to affect the possession of the property until after the widow's death. This might well be said not to be a conveyance of the estate to the then next reversioner, for it was a conveyance to a person who might or might not be next reversioner at the time when the property passed under the conveyance.

The Privy Council lay down that it was essentially necessary that the widow should withdraw her whole

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 ———  
 HARRINGTON  
 J.

(1) (1891) I. L. R. 19 Cal. 236; L. R. 19 I. A. 30.



1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 ———  
 HARRINGTON  
 J.

life-estate, so that the whole estate should get vested in the grantee, and say that this will be a practical check on the frequency of such conveyances. It is not quite clear, I think, whether their Lordships meant by the words "whole estate" every *bigah* of land of which the estate consisted—or whether they meant the absolute estate, as contrasted with an estate subject to a preceding life interest. For the purposes of the judgment, the latter proposition was necessary, not the former.

I do not think that this case can be regarded as affording an answer in the negative to the question submitted to us. If the words "whole estate" mean every foot of land, then the case would afford an answer to the question, but I think that the words "whole estate" refer to the nature of the estate in the property conveyed—and that the case does not afford an answer to the question before us.

It is, however, inconsistent with the proposition that the widow and the next reversioner completely represent the estate and are able to make such disposition of it as they choose—if they could they would be able to make the disposition which the Privy Council have held cannot be made—and it is an authority for the proposition that a widow cannot, even with the consent of the next reversioner, retain possession of the estate and make a disposition of it to take effect at a future time.

We are led, therefore, to the proposition that a widow can alienate with the consent of the next reversioner, but such an alienation must be complete and effective, *i.e.*, she must not retain possession of the property.

The question of difficulty is to say on what principle of law is this power in the widow to be supported. Is it on the ground that she can relinquish in favour

of a reversioner, or on the ground that the consent of the reversioners is evidence that she is acting within her powers in alienating the estate?

The instances given of relinquishment are those in which the widow does something which destroys her capacity for holding property—such as incurring a voluntary death, or entering a religious order. I think, if relinquishment is to be taken in its strict sense, it would involve something which rendered the widow no longer capable of being her husband's heir. It is true, nevertheless, that the texts recognise gifts by the widow of a portion of the estate to her husband's kindred as meritorious. She appears, therefore, to have had a power of alienating portions of the estate, while she still filled the position of being the possessor of the estate; but these powers, whether of relinquishing the whole estate by entering a religious order or alienating part by giving it to her husband's kindred, only enabled her to benefit the heirs of her husband, and did not enable her to get any advantage for herself.

I do not, therefore, think that her power to alienate for valuable consideration can be placed on either of these grounds, for I think that when a widow converts her husband's property into money and enjoys that, she cannot be said to relinquish it, nor can she be said to make a gift when she receives valuable consideration for the conveyance.

Is it then to be taken that the consent of the next reversioners is evidence of the propriety of the transaction? If it be taken merely as evidence, then it is open to be rebutted—and it can be shewn that there was in fact no legal necessity for the conveyance; if, on the other hand, it is conclusive evidence, then it affords an answer to the question.

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.  
HARRINGTON  
J.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 HARRINGTON  
 J.

It is clear that a widow for her religious or charitable purposes, or for those which were supposed to conduce to the spiritual welfare of her husband, or under pressure of legal necessity, is entitled to sell or mortgage the whole or any portion of her husband's estate.

The transaction, therefore, was not one which lay wholly outside the power of the widow. She might deal with the estate under certain circumstances, and if the consent is to be taken as conclusive evidence that these circumstances exist, there is an end of the question.

In the case of *Kalee Mohun Deb Roy v. Dhununjoy Shaha* (1), decided in 1886, the consent of the then next reversioner was treated as evidence of the existence of legal necessity. The Judges do not say it was conclusive evidence: they say it gives rise to a strong presumption that such necessity existed in the absence of evidence of the want of legal necessity.

The case of *Pulin Chandra Mandal v. Bolai Mandal* (2), decided in 1908, goes so far as to affirm the proposition that an alienation of a portion of the husband's estate by the widow is valid even though there is no legal necessity, if made with the consent of the then reversioner. This case goes further than the case of *Hem Chunder Sanyal v. Sarnamoyi Debi* (3), decided in 1894, in which it is laid down that the widow may convey to the next reversioner or to a third party, with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest. The Judges, however, after discussing the texts and the cases say that they are not prepared to hold that the widow and the next reversioner are competent to deal with the

(1) (1886) 6 W. R. 51.

(2) (1908) I. L. R. 35 Calc. 939.

(3) (1894) I. L. R. 22 Calc. 354.

property so as to convert the widow's estate (the property remaining in her) into an absolute estate.

The former of these two cases supports the proposition contended for by the respondent, but on the question whether the alienation would be held to be good, even if it were established that no legal necessity existed, the case of *Pulin Chandra Mandal v. Bolai Mandal* (1), is inconsistent with the earlier case of *Kalee Mohun Deb Roy v. Dhunioy Shaha* (2), and, moreover, it lays down what is not consistent with the judgment of the Privy Council. In *Raj Lukhee Dabra v. Gokool Chunder Chowdhury* (3), their Lordships say in reference to the effect of the consent of the husband's kindred, "there should be such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one": and while saying it is not a *presumptio juris et de jure*, they say, "it is, no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction."

I think that the conclusion to be drawn from the cases is to show that the widow, with the consent of the then next reversioner, has the power of making an alienation of the whole or any portion of her deceased husband's estate—but that the power is limited to this extent that no act done by the widow, with the concurrence of the then next reversioner, or by the then next reversioner, can have the effect as against the actual reversioner of giving the widow a greater estate in the property than she has under the Hindu law: see *Hem Chunder Sanyal v. Sarnamoyi Debi* (4). The widow and next reversioner are not,

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAF  
BHAGAT.  
HARRINGTON  
J.

(1) (1908) I. L. R. 35 Calc. 939. (3) (1869) 3 B. L. R. (P. C.) 57;

(2) (1866) 6 W. R. 51.

13 Moo. I. A. 209.

(4) (1894) I. L. R. 22 Calc. 354.

1913  
 DEBI  
 PROSAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 ———  
 HARINGTON  
 J.

therefore, enabled jointly to deal with the estate as though their joint power was equivalent to that of an absolute owner.

I think the principle on which an alienation by the widow with the consent of the next reversioner is to be supported is that it raises a strong presumption that at the time of the alienation the persons then interested in preventing the alienation were unable to dispute its propriety, or, in other words, that circumstances existed which enabled the widow in accordance with the rules of Hindu law to alienate the estate so as to destroy the interest which might in future descend on the next reversioners as heirs to her deceased husband. The presumption is a very strong one; and though not absolutely irrebuttable, evidence to rebut it would not affect the validity of the transaction, if it were established that the mortgagee or purchaser had given valuable consideration, and had acted *bonâ fide*, believing, on the faith of such consent, that circumstances justifying the alienation existed. I would therefore answer the question submitted to us in the terms which have been proposed by my Lord.

STEPHEN J. In answering the question referred to us, we have to deal with only one of the two methods by which a Hindu widow can alienate the property of her deceased husband in which she has inherited an estate. For present purposes, it may be taken for granted that her alienation of the whole or part of it can be supported by proof that it was necessary, or, what is practically the same thing, for the purpose of benefiting her husband's kindred in one of the limited number of ways prescribed in the Hindu texts, with which we are not immediately concerned. Furthermore, proof of due enquiry by the purchaser into the necessity of the alienation,

leading to an honest belief on his part that necessity exists, is taken to be a proof of necessity, as far as he is concerned.

Taking this to be so, the question to be decided is: What is the effect of the consent to the alienation of the next heir to the deceased husband for the time being? And on a review of the authorities that have been quoted to us, by which we are bound, the answer seems to me as follows. In the first place, there is no doubt that the consent of the kindred, not necessarily the next heir of the deceased husband, to alienation by a Hindu widow is evidence that "the transaction was a fair one; and one justified by Hindu law," but it seems that the effect of such concurrence is at most to raise a presumption: *Rai Lukhee Dabee v. Gokool Chunder Chowdhury* (1). Even for this purpose the consent of all the kindred is necessary, and the circumstances of the concurrence of any of them must be considered: *Sham Sundar Lal v. Achhan Kunwar* (2). Ordinarily, the consent of the whole body of persons constituting the next reversioners should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible: *Bajrangi Singh v. Manokarnika Bakhsh Singh* (3). I feel some difficulty in appreciating the full scope of this rule, but I have no doubt that it applies to a case when the consent of a reversioner is relied on as affording evidence of the necessity of an alienation. On principle and on authority these rules apply where the alienation is of the whole or a part of the widow's estate.

1913  
DEBI  
PRASAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.  
STEPHEN J.

(1) (1869) 13 Moo. I. A. 209.

(2) (1898) I. L. R. 21 All. 71 ;

L. R. 25 I.A. 183.

(3) (1907) I. L. R. 30 All. 1 ;

L. R. 35 I. A. 1.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 —  
 STEPHEN J.

In the second place, consent to the widow's alienation has an effect on that alienation in cases where the widow may be supposed to have relinquished her rights over her deceased husband's property. That a Hindu widow can cede and relinquish her rights in favour of the reversioner is clearly laid down by Ramesh Chandra Mitter J. in *Gunga Pershad Kur v. Shumbhoonath Burman* (1) relying on the decision in *Sreemutty Jadomoney Dabee v. Saradaprosono Mookerjee* (2). The decision in this case was confirmed on a Letters Patent Appeal, and its principle is recognised by the Privy Council in *Behari Lal v. Madho Lal Ahir Gaya-wal* (3), where it is said that "the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate", but it is "essentially necessary" for her "to withdraw her own life-estate, so that the whole estate should get vested at once in the grantee." The principle is also recognised by a decision of a Full Bench of this Court in *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (4), but a conclusion is drawn from it by which I conceive that we are bound, and which in my opinion carries the matter very much further. In that case a widow sold to a stranger a share in a *taluk*, which I understand to have been treated as the whole of the property inherited by her from her deceased husband. The reversioner then executed a separate document in which he assented to the conveyance by the widow, and covenanted for himself and his heirs that he would not lay claim to the property at any future time. The reversioner then predeceased the widow, and on her death the person

(1) (1874) 22 W. R. 393.

(3) (1891) I. L. R. 19 Calc. 236 ;

(2) (1856) 1 Boullnois 120 ;

L. R. 19 I. A. 30.

3 I. D. (O. S.) 72.

(4) (1884) I. L. R. 10 Calc. 1102.

who succeeded to the property was one who was not bound by the covenant of the previous reversioner. On these facts, Garth C. J., after referring to the principle of relinquishment, points out that it frequently happens "that a widow who is anxious to turn her husband's estate into money, may arrange with the next heir of her husband for the time being, to alienate the estate to some third person for their mutual benefit. They may both share in the profits of such a transaction", and thus the person who would be the next male heir to the deceased husband at the time of the widow's death is deprived of his rights. He then goes on—"But, if it is once established, as a matter of law, that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may thus agree to make." After quoting authorities he goes on—"To allow the widow to relinquish her estate to the next male heir of her husband, is one thing; but to allow her to sell the whole inheritance, without any legal necessity, *merely with the consent of the next male heir* so as to bar the rights of other heirs of her husband in the future, is another thing." He then concludes, on authority and on grounds of practical-convenience, that it is impossible to hold that the widow may not sell the estate in the way described. Mitter J., after pointing out that a widow can relinquish the whole of her estate to the next heir, adds: "But, if the widow is competent to relinquish her estate to the next male heir of her husband, it follows, as logical consequence, that she can alienate it merely with his consent, without any legal necessity," referring to the decision in *Mohunt Kishen Geer v. Busgeet Ray* (1) to show that the one

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 STEPHEN J.



1913  
 DEBI  
 PROSAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 —  
 STEPHEN J.

proposition follows as a logical consequence of the other.

This decision is based on the principle of relinquishment, though that principle is not distinguished from, or contrasted with, the principle of consent being evidence of the propriety of the alienation, and, as I understand the matter, a sale by the widow with the consent of the reversioner is held on authority and for purposes of practical convenience to be equivalent to a relinquishment by the widow in favour of the reversioner, and a conveyance by him.

The difference between a sale by the widow with the consent of the reversioner, and a sale by the reversioner after a relinquishment by the widow, may be to some extent a matter of form, a view to which the Judges who decided *Mohunt Kishen Geer's* case (1) seem to have inclined ; but Garth C. J. expressly contemplates a case in which the sale is not only formally, but actually, by the widow, because he supposes it to be made for the common benefit of the widow and the reversioner, and that they share in the profits of the transaction. A sale by which the widow receives the price of her husband's property does not seem to be a relinquishment, as that term is used in earlier cases and in the later case of *Behari Lal v. Madho Lal Ahir Gayawal* (2), but there I read this case as extending the meaning of relinquishment so as to make it indistinguishable, as far as I am concerned, from alienation, and I find nothing in the later case in the Privy Council overruling this construction. Personally I am fortified in this view by finding that Banerjee J. in *Hem Chunder Sanyal v. Sarnamoyi Debi* (3) acquiesced in the decision in *Nobokishore's*

(1) (1870) 14 W. R. 379.

(3) (1894) I. L. R. 22 Calc. 354.

(2) (1891) I. L. R. 19 Calc. 236 ; I. R. 19 I. A. 30.

case (1), however unwillingly he may have done so, and we are as much bound by it as he was.

On my view of the effect of the decision in this case, a difficulty arises as to whether the decision covers an alienation of a part as well as of the whole. In its terms, it seems not to, but in principle there is no reason why it should not, and the Court in *Hem Chunder Sanyal's* case (2) seems to have thought it did: on the other hand, the decision in *Behari Lal's* case (3) which was given after *Nobokishore's* case (1), though it does not notice it, and before *Hem Chunder Sanyal's* case (2) is unmistakably clear as to the necessity for a relinquishment being of the whole property.

Under these circumstances, I consider that the decision in *Nobokishore's* case (1) makes a sale by a Hindu widow of all her interests in the property that she has inherited from her husband competent to pass an absolute title to the transferee, if it is made with the consent of the then heirs of her husband, and it has not been suggested in this case that a mortgage is to be distinguished in this respect from a sale. How far this rule may extend it is not necessary to consider exactly on the present occasion, though I think it may safely be said that it might lead us out of sight of our starting point in the Hindu law. But I do not think we are bound to apply the rule in question to a case where, as in the one before us, only a portion of the property in which the widow is interested is affected by her action. In *Bajrangi Singh's* case (4) where the law laid down in *Nobokishore's* case (1) seems to be approved of, the widow executed successive transfers of all the property she inherited from her husband;

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOPAL  
BHAGAT.  
STEPHEN J.

(1) (1884) I. L. R. 10 Calc. 1102. (3) (1891) I. L. R. 19 Calc. 236,

(2) (1894) I. L. R. 22 Calc. 354. L. R. 19 I. A. 30.

(4) (1907) I. L. R. 30 All 1; L. R. 35 I. A. 1.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 ———  
 STEPHEN J.

she then died, and subsequently persons who, in view of the judgment of the Privy Council, must be taken to represent the reversioners at the time, ratified the widow's alienations. If we take this case to be decided on the theory of relinquishment as well as on that of necessity being presumed from consent, which I think we must, the ratification applies at least to a complete alienation and the case is therefore no authority for extending the rule laid down in *Nobokishore's* case (1) to an alienation of a part. This follows from a consideration of the facts of the case, but it is also to be observed that their Lordships do not consider that they are laying down any new principle, and express themselves as being "unwilling to extend the widow's power of alienation beyond its present limits." I therefore concur in the answer to the question before us suggested by the Chief Justice.

MOOKERJEE J. The question referred for decision to the Full Bench has been formulated as follows:

"Is the alienation, by way of mortgage by a Hindu widow of a portion of the estate of her husband, without any proved legal necessity, but with the consent of the next reversioner for the time being, valid and binding on the actual reversioner who is not the heir of the consenting reversioner?"

The texts relevant for the determination of this question are those of Katyayana, Vyasa, and Narada, quoted by Jimutavahana in the *Dayabhaga*, Chapter XI, section 1, paragraphs 56, 60, 64:

"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

*Katyayana.*

“For women, the heritage of their husband is pronounced applicable to use. Let not women on any account make waste of their husband’s wealth.”

*Mahabharata.*

“When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power. But, if the husband’s family be extinct or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a sapinda.”

*Narada.*

From these texts, Jimutavahana draws the inference that it is competent to the widow to enjoy the estate for life, which goes, upon the termination of her interest, to the heirs of her husband; it is also competent to her to make a gift or sale for the obsequies of her husband, and for other religious and charitable purposes; she may also, in case of necessity, mortgage the property, or sell or otherwise alienate it. We have consequently the principle that a widow can alienate the corpus of the property inherited by her for purposes of necessity, she can sell it, or mortgage it, and, in certain cases, she can even make a gift of a reasonable portion of it: *Collector of Musulipatam v. Cavalj Vencata* (1). Upon this fundamental principle, has been engrafted, by judicial decisions, the equitable doctrine that a transferee is protected if he proves that he made proper and *bonâ fide* enquiries as to the actual existence of such alleged necessity, and did all that was reasonable to satisfy himself as to the existence of such necessity: *Amarnath Sah v. Achan Kuar* (2),

1913  
DEBI  
PROSAD  
CHOWDHURY  
P.,  
GOLEP  
BHAGAT.  
— — —  
MOOKERJEE  
J.

(1) (1861) 8 Moo. I. A. 529 ;  
2 W. R. (P. C.) 61.

(2) (1892) I. L. R. 14 All. 420 ;  
I. R. 19 I. A. 196.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 ———  
 MOOKERJEE  
 J.

*Bhagwat Dayal Singh v. Debi Dayal Sahu* (1) and *Hunoomanpersaud Pandey v. Babooee Munraj Koonveree* (2). It is therefore firmly settled that a widow takes only a restricted estate in the property of her husband, and that, at her death, it passes to the heirs of her husband, except as to such portion as may have been alienated by her for legal necessity [*Govindchund Bysack v. Cossinaut Bysack* (3)], and it is beyond controversy that, upon this point there is no difference between the Dayabhaga and the Mitakshara schools of Hindu law: *Keerut Singh v. Koolahul Singh* (4), *Collector of Masulipatam v. Cavalry Vencata Narrainamph* (5), *Mussumat Thakoor Deyhee v. Rai Baluk Ram* (6), *Bhugwandeem v. Myna Bae* (7).

The question next arises, whether, apart from legal necessity, a widow is competent to alienate the corpus of the property inherited by her, with the consent of the then next reversioners, so as to bind the person who turns out to be the actual reversioner at the time of her death. This question was answered in the affirmative by the Bengal Sadar Court in *Hem Chund Mujoomdar v. Mussummaut Tara Munnee* (8), *Gocul Chund Chuckerwurtee v. Mussummaut Rajranee* (9), *Mussummaut Bijya Dibeh v. Mussummaut Unpoorna Dibeh* (10), and *Bindrabun Chund*

- |  |  |
|--|--|
| (1) (1908) I. L. R. 35 Calc. 420 ;<br>L. R. 35 I. A. 48. | (6) (1866) 11 Moo. I. A. 139.                              |
| (2) (1856) 6 Moo. I. A. 393 ;<br>18 W. R. 81 n.          | (7) (1867) 11 Moo. I. A. 487 ;<br>9 W. R. (P. C.) 23.      |
| (3) (1826) Montr. H. L. C. 477 ;<br>1 I. D. (O. S.) 292. | (8) (1811) 1 Mac. Sel. Rep. 481 ;<br>6 I. D. (O. S.) 352.  |
| (4) (1839) 2 Moo. I. A. 331 ;<br>5 W. R. (P. C.) 131.    | (9) (1816) 2 Mac. Sel. Rep. 213 ;<br>6 I. D. (O. S.) 521.  |
| (5) (1861) 8 Moo. I. A. 529 ;<br>2 W. R. (P. C.) 61      | (10) (1806) 1 Mac. Sel. Rep. 215 ;<br>6 I. D. (O. S.) 159. |

*Rai v. Bishun Chund Rai* (1). The reason for this conclusion does not appear to have been clearly formulated, even if appreciated, in the earlier decisions. But reference is made in more than one place to the fact that according to the text of Narada, the relations of the husband are the natural guardians of the widow and they are not likely to consent to an alienation, unless there is justifying necessity for it. In a very early case, however, *Mohun Lal Khan v. Ranee Siroomunnee* (2), the question was pointedly raised as to who were the relations of the husband whose consent was essential to validate the alienation by the widow. It was ruled that an alienation by the widow to be valid must bear the assent of the next heirs and the paternal kindred of her husband, and the same view was affirmed in *Roopchurn Mohapiter v. Anundlal Khan* (3). The point arose for consideration before the Judicial Committee in *Rany Srimuty Dibeah v. Rany Koond Luta* (4), but was not decided, though their Lordships referred without disapproval to *Mohun Lal Khan v. Ranee Siroomunnee* (2), the decision wherein was stated to have been "founded expressly on the ground that the deed then in question was executed without the concurrence of the descendants in the male line, who, though they were not heirs, were guardians or protectors of the widow." A similar view was accepted by the Bengal Sadar Court in *Hafzoonnissa Begum v. Radhabinode Missur* (5). See also *Nundkomar Rai v. Rai Indurnaraen* (6), *Mussumaut Bhuwani Munee v. Mussumaut*

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.  
—  
MOOKERJEE  
J.

(1) (1826) 4 Mac. Sel. Rep. 180 ;  
7 I. D. (O. S.) 134.

(4) (1847) 4 Moo. I. A. 292 ;  
7 W. R. P. C. 44.

(2) (1812) 2 Mac. Sel. Rep. 40 ;  
6 I. D. (O. S.) 389.

(5) (1856) Beng. S. D. A. R. 595.

(6) (1808) 1 Mac. Sel. Rep. 349 ;

(3) (1812) 2 Mac. Sel. Rep. 45 ;  
6 I. D. (O. S.) 392.

6 I. D. (O. S.) 256.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT,  
 MOOKERJEE  
 J.

*Solukhan* (1). This view, however, was repudiated by the Supreme Court in a case decided shortly after. *Jadomoney v. Sarodaprosono* (2), in which it was ruled that the reversioners whose consent was necessary to validate an alienation by the widow consisted of that class of persons only who would immediately succeed to the estate if the widow's interest was determined, and did not include that wider class of persons who might by possibility become heirs on the happening of that event. Sir Charles Jackson J. observed that where the widow's conveyance is executed with the consent of all the nearest heirs living at the time of conveyance, and there are no other heirs of preferable or equal degree living at the decease of the widow, the whole estate in possession and the reversion has been sufficiently represented for the purpose of such conveyance, and the conveyance itself is valid.

The learned Judge referred to the note of Mr. Colebrooke to the case of *Mahoda v. Kuleani* (3) to the effect that a "widow's gift of the estate to the next heir is good in law, as such a gift is a mere relinquishment of her temporary interest in favour of the next heir; it may, however, happen that the person who would have been entitled to take the inheritance at her decease might be different from the one who obtained it under gift or relinquishment to him as presumptive heir, and if the title of that person be either preferable or equal, it may invalidate such gift in whole or in part." Here we see the origin of what may be called the relinquishment theory, first formulated by Mr. Colebrooke, and applied, possibly unconsciously, in the cases

(1) (1811) 1 Mac. Sel. Rep. 431 ;      (2) (1856) 1 Bonlnois 120 ;  
 6 I. D. (O. S.) 315.                      3 I. D. (O. S.) 72.  
 (3) (1803) 1 Mac. Sel. Rep. 84 ; 6 I. D. (O. S.) 62.

of *Mussummant Bijya Dibeh v. Mussummant Unpoorna Dibeh* (1), *Collychund Dutt v. Moore* (2), and *Ramdhun Bakshee v. Panchann Bose* (3). Sir James Colville, C.J., in the same case, *Jadomoney v. Sarodiprosomo* (4), expressly adopts the relinquishment theory as consistent with the letter and spirit of the Hindu law. He first described the nature of the estate of a Hindu widow in the words of Lord Gifford in *Cossinant Bysack v. Gorindchand Bysack* (5), and accepts the view of the true position of a reversioner as defined by Sir Lawrence Peel, in *Oofutmoney Dossee v. Sagormoney Dossee* (6), and *Hurry Dass Dutt v. Rannjammoney Dossee* (7). The learned Chief Justice then points out that the policy of the Hindu law is not to keep the estate, as long as possible, inalienable and subject to a species of entail in favour of persons unascertained, but to prevent the alienation of family property from taking place, either by operation of law in favour of the widow's natural heirs, who would generally be other than the heirs of her husband, or in favour of strangers, by the gift or other disposition of the widow. Reference is made in support of this view to the Dayabhaga of Jimutavahana, chapter XI, section 1, paras. 63 and 64. As a matter of fact, the theory of relinquishment is foreshadowed in the Dayabhaga, chapter XI, section 1, para. 59, where Jimutavahana lays down that the persons who would be the next heirs on failure of prior claimants, succeed to the

1913

DEBI

PRESAD  
CHOWDHURY  
c.GOLAP  
BAGATMOOKERJEE  
J.

- |   |  |
|---|--|
| (1) (1806) 1 Mac. Sel. Rep. 215 ;<br>6 I. D. (O. S.) 159. | (5) (1826) Montr. H. L. C. 477 ;<br>1 I. D. (O. S.) 292. |
| (2) (1837) Fulton 73 ;<br>1 I. D. (O. S.) 687.            | (6) (1850) 1 Tay. & Bell. 370 ;<br>2 I. D. (O. S.) 491.  |
| (3) (1853) Beng. S. D. A. R. 641.                         | (7) (1851) 2 Tay. & Bell. 279 ;                          |
| (4) (1856) 1 Boulhois 120 ;<br>3 I. D. (O. S.) 72.        | 2 I. D. (O. S.) 744.                                     |



1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 ———  
 MOOKERJEE.  
 J.

residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested, in the same manner as they would have succeeded if the widow's right had never taken effect. The words used by Jimutavahana जाताधिकारायः पक्षे अधिकार प्रवृत्तिर्न भोगवशितं घनं गृह्यते: ("if her right ceases or never takes effect") are comprehensive enough to include, not merely the case of the death of the widow, but all cases where her right ceases; in other words, the reversioners take the estate, not merely when the widow dies, but also when her title is extinguished, for instance by renunciation, remarriage or the like. It is plain, therefore, that in 1856 two principles were recognised by our Courts. According to one principle, an alienation by a widow, made with the consent of all the possible heirs of her husband, was held operative because the consent of persons who were the guardians of of the widow, and who were, as the next possible takers of the estate, most deeply interested in its preservation, indicated the propriety of the transaction: *Kalee Mohun Deb Roy v. Dhununjoy Shaha* (1), *Madhub Chunder Hajrah v. Gobind Chunder Banerjee* (2). According to the other principle, an alienation by a widow, made with the consent of the entire body of the immediate reversioners, was held operative, because between the widow and the reversioners the entire estate was represented, inasmuch as the widow might relinquish her estate in favour of the reversioners and create in them a present indefeasible interest. These two doctrines, as is plain from an examination of the texts and from the history of the judicial decisions on the subject, were entirely distinct in their inception and development. But, as

an examination of the cases shows, the distinction was subsequently overlooked, and the indiscriminate application of the two principles has caused much embarrassment.

In so far as the consent theory is concerned, it is plainly indicated by Turner L. J. in *Collector of Mustipatam v. Cavalry Venkata Narrainapah* (1) in the following passage: "It may be taken as established that an alienation by her (the widow) which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. *The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper*".

The same view is emphasised by Sir James Colville in *Raj Lukhee Dabea v. Gokool Chunder Chowdhry* (2): "their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be *such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law*. That it can be a presumption of law in the sense of *præsumptio juris et de jure*, their Lordships do not think. It is, no doubt, an element to be taken into

1913  
DEBI  
PRASAD  
CHOWDHURY  
v.  
GOLAP  
BRAGAT.  
MOOKERJEE,  
J.

(1) (1861) 8 M. o. L. A. 529 ; (2) (1869) 13 Moo. L. A. 209.  
2 W. R. (P. C.) 61.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 ———  
 MOOKERJEE  
 J.

consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction."

Again, in *Sham Sundar Lal v. Achhan Kunwar* (1), Lord Davey gives expression to the theory that consent of reversioners merely affords proof of the propriety of the transaction, in the following terms: "At the date of the bond of 1877, Hulas Kuar, as the heir of Khairati Lal was the owner of his estate, but with a restricted power of alienation. Achhan Kunwar was next in succession, and, would, if she survived her mother, become her father's heir and take the estate, subject to the same restriction. Inayat Singh was one of the two male heirs next in succession to the restricted estate who would be full owners in the event of their surviving their grandmother and mother. Inayat was moreover a minor. At the date of the bond of 1881, Achhan Kunwar was owner of the property for a daughter's estate with restricted power of alienation and Inayat Singh was one of the heirs apparent. At both dates Inayat Singh was living in his father's house and dependent upon him. In 1877 neither Achhan Kunwar nor Inayat Singh (even if he had been of age), could by Hindu law make a disposition or bind their expectant interests, nor does the deed apply to any but rights in possession, and in 1881 Inayat Singh was equally incompetent to do so, though the deed purports to bind future rights. To give validity to the bonds as against the estate of Khairati Lal, the plaintiffs and appellants must show that there was legal necessity for raising the money by a charge on Khairati's estate, or, at least, that in advancing their money the creditors gave credit on reasonable grounds to representations that the money was wanted for

(1) (1898) L. R. 21 All. 71; L. R. 25 I. A. 183.

such necessity. It is not a case in which all the kindred of Khairati have assented or could assent to the bonds, or either of them, *and the circumstances are not such as, in the opinion of their Lordships, to raise any presumption, from such concurrence as there was of Achhan Kunwar and Inayat Singh in the first bond or of Inayat Singh in the second bond, that the transaction was a fair one or one justified by Hindu law. In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect.*"

On the other hand, the relinquishment theory was clearly explained by Lord Morris in the case of *Behari Lal v. Madho Lal Ahir Gayaral* (1) in the following terms: "At the time of the execution of the *ikarnama*, Madho Lal was not born, so that the plaintiff was then the apparent reversionary heir, subject to the life estate of his grandmother, Lachoo Dai; *it may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole estate should at once rest in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances.*"

The two doctrines, thus formulated and applied, came up for examination by their Lordships of the Judicial Committee in *Bajranghi Singh v. Manokarnika Bakhsh Singh* (2), and it is remarkable that neither theory was expressly repudiated or approved,

(1) (1891) I. L. R. 19 Calc. 236;  
I. R. 19 I. A. 30.

(2) (1907) I. L. R. 30 All 1;  
I. R. 35 I. A. 1.

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.  
MOOKERJEE  
J.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 MOOKERJEE  
 J.

though detailed reference was made to judicial decisions in which either the one or the other principle had found acceptance. Under these circumstances, I think, the inference may legitimately be drawn from the decision of their Lordships in *Bajrangi Singh v. Manokarnika Bakhsh Singh* (1), that both the doctrines are well founded on principle; the only question is, what are the limitations or qualifications, if any, subject to which each of these doctrines has to be applied. If the widow has alienated the whole of the estate of her husband with the consent of some only of the immediate reversioners, or, if she has alienated a part only of the estate of her husband with the consent of all the immediate reversioners, or, again, if she has alienated part of the estate of her husband with the consent of some only of the immediate reversioners, the consent merely furnishes evidence of the propriety of the transaction or of the fact that the transferee has taken after due enquiry as to the existence of legal necessity. The presumption which thus arises from the consent of the reversioners is not conclusive and is rebuttable; but, plainly, there is no room for the application of the relinquishment theory. In each of these cases, either the widow does not absolutely convey and destroy her limited estate or she does not accelerate the estate of the entire body of immediate reversioners. On the other hand, if the widow transfers the entire estate of her husband with the consent of the whole body of immediate reversioners, the relinquishment theory becomes forthwith applicable; the position is precisely the same as if the widow had withdrawn completely and in its entirety her own qualified estate, and the whole estate had vested at once in the entire body of immediate reversioners, who, upon this acceleration of their estate, had

(1) (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.

conveyed an absolute interest to the transferee. The distinction between the two classes of cases is fundamental and well marked, and if it is borne in mind, we can appreciate without difficulty why Sir Andrew Scoble observes in *Bajrangi Singh v. Manokarnika Bakhsh Singh* (1) that ordinarily the consent of the whole body of persons constituting the next reversioners should be obtained, as laid down in *Rudha Shyam Sircar v. Joy Ram Senapati* (2), but that there may be cases in which special circumstances may render the strict enforcement of this rule impossible. This view is consistent only with the doctrine that consent of reversioners, in certain classes of cases as already explained, merely furnishes presumptive evidence of the propriety of the transaction; from this standpoint, the rule laid down in *Ramphal Rai v. Tula Kuari* (3) cannot be sustained. On the other hand, the class of cases to which the relinquishment theory is applicable is easily defined; they are cases in which two elements are present, namely, *first*, a transfer by the widow of the entire inheritance in her hands, and, *secondly*, the consent of the entire body of persons who would be entitled to succeed upon the extinction of the qualified estate of the widow. This view, I venture to think, does not really militate against the decision of the Full Bench in *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (4). Sir Richard Garth clearly contemplated a case in which the analogy of relinquishment of her estate by the widow could be applied; he speaks explicitly of the death of the widow or of the renunciation of the world by her, or of some act by her which might in the eye of law justify the

1913  
DEBI  
PRASAD  
CHOWDHURY  
v.  
GOLAP  
BISWAT.  
MOOKERJEE  
J.

(1) (1907) I. L. R. 30 All. 1;      (2) (1890) I. L. R. 17 Calc. 896.

I. R. 35 I. A. 1.

(3) (1883) I. L. R. 6 All. 116.

(4) (1884) I. L. R. 10 Calc. 1102.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 ———  
 MOOKERJEE  
 J.

though detailed reference was made to judicial decisions in which either the one or the other principle had found acceptance. Under these circumstances, I think, the inference may legitimately be drawn from the decision of their Lordships in *Bajrangi Singh v. Manokarnika Bakhsh Singh* (1), that both the doctrines are well founded on principle; the only question is, what are the limitations or qualifications, if any, subject to which each of these doctrines has to be applied. If the widow has alienated the whole of the estate of her husband with the consent of some only of the immediate reversioners, or, if she has alienated a part only of the estate of her husband with the consent of all the immediate reversioners, or, again, if she has alienated part of the estate of her husband with the consent of some only of the immediate reversioners, the consent merely furnishes evidence of the propriety of the transaction or of the fact that the transferee has taken after due enquiry as to the existence of legal necessity. The presumption which thus arises from the consent of the reversioners is not conclusive and is rebuttable; but, plainly, there is no room for the application of the relinquishment theory. In each of these cases, either the widow does not absolutely convey and destroy her limited estate or she does not accelerate the estate of the entire body of immediate reversioners. On the other hand, if the widow transfers the entire estate of her husband with the consent of the whole body of immediate reversioners, the relinquishment theory becomes forthwith applicable; the position is precisely the same as if the widow had withdrawn completely and in its entirety her own qualified estate, and the whole estate had vested at once in the entire body of immediate reversioners, who, upon this acceleration of their estate, had

(1) (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.

conveyed an absolute interest to the transferee. The distinction between the two classes of cases is fundamental and well marked, and if it is borne in mind, we can appreciate without difficulty why Sir Andrew Scoble observes in *Bajrangi Singh v. Manokarnika Bakhsh Singh* (1) that ordinarily the consent of the whole body of persons constituting the next reversioners should be obtained, as laid down in *Radha Shyam Sircar v. Joy Ram Senapati* (2), but that there may be cases in which special circumstances may render the strict enforcement of this rule impossible. This view is consistent only with the doctrine that consent of reversioners, in certain classes of cases as already explained, merely furnishes presumptive evidence of the propriety of the transaction; from this standpoint, the rule laid down in *Ramphal Rai v. Tula Kuari* (3) cannot be sustained. On the other hand, the class of cases to which the relinquishment theory is applicable is easily defined; they are cases in which two elements are present, namely, *first*, a transfer by the widow of the entire inheritance in her hands, and, *secondly*, the consent of the entire body of persons who would be entitled to succeed upon the extinction of the qualified estate of the widow. This view, I venture to think, does not really militate against the decision of the Full Bench in *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (4). Sir Richard Garth clearly contemplated a case in which the analogy of relinquishment of her estate by the widow could be applied; he speaks explicitly of the death of the widow or of the renunciation of the world by her, or of some act by her which might in the eye of law justify the

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.  
MOOKERJEE.  
J.

(1) (1907) I. L. R. 30 All. 1;      (2) (1890) I. L. R. 17 Calc. 896.

L. R. 35 I. A. 1.

(3) (1883) I. L. R. 6 All. 116.

(4) (1884) I. L. R. 10 Calc. 1102.



1913  
 DEBI  
 PROSAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 MOOKERJEE  
 J.

inference that she was civilly dead. The learned Chief Justice also refers to the contingency of a disclaimer by her at the time of the death of her husband. In each of these instances, her interest in the entire estate left by her husband would be withdrawn from her and become vested in the then immediate reversioners. Mr. Justice Romesh Chandra Mitter is equally explicit on the point. He plainly contemplated a relinquishment of the entire estate by the widow in favour of the then next male heir of her husband. I am not unmindful that Mr. Justice Banerjee, who, when at the Bar, successfully argued the case of *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (1), on behalf of the respondent, stated in the case of *Hem Chunder Sanyal v. Sarnamoyi Debi* (2), that the principle of the Full Bench decision is applicable to transfers of part of the estate as of the whole, and this was subsequently accepted without question in *Pulin Chandra Mandal v. Bolai Mandal* (3). An examination of the record, however, in the case of *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (1) does not confirm the view taken by Mr. Justice Banerjee; on the other hand, so far as I can gather, the alienation in controversy covered the entire estate and was made with the consent of the entire body of immediate reversioners. The two points which were considered by the Full Bench were in essence these, namely, *first*, whether a transfer by the widow with the consent of the immediate reversioner could be treated as equivalent to a transfer by the widow to the reversioner followed by a transfer by the latter to the alienee, and, *secondly*, whether a transfer by the widow to the immediate reversioner stood on the same footing as a real relinquishment by

(1) (1884) I. L. R. 10 Calc. 1102. (2) (1894) I. L. R. 22 Calc. 354.

(3) (1908) I. L. R. 35 Calc. 939.

her. Upon the first point, it was ruled, in consonance with previous decisions [*Shama Soonduree v. Shurrit Chunder Dutt* (1), *Mohunt Kishen Geer v. Busgeet Roy* (2), *Gunga Pershad Kur v. Shumbhoonath Burmun* (3), *Muddoosoodun Doss v. Mohenderlall Khan* (4)], that the question was one of form rather than of substance, and, that, consequently, a conveyance by the widow with the assent of the immediate reversioner might be deemed to operate precisely in the same manner as two conveyances, one by the widow to the reversioner and the other by the reversioner to the transferee. Upon the second point, Sir Richard Garth was inclined to take the view that a sale of the whole inheritance by the widow to the immediate reversioner did not stand on the same footing as a real relinquishment by her, and, apparently, Mr. Justice Pigot was of the same opinion; but, in view of a series of prior decisions of this Court [*Raj Bullubh Sen v. Oomesh Chunder Roos* (5), *Trilochun Chuckerbutty v. Umesh Chunder Lahiri* (6)], they acceded to the contention that a transfer of the whole inheritance to the next male heir might be treated as a relinquishment by her in his favour. If the matter were *res integra*, I would without hesitation adopt the view that a sale by the widow of the entire inheritance to the then immediate reversioner does not possess the characteristics of a real relinquishment by her, as contemplated by Hindu law-givers. A widow who transfers the property for a consideration or retains an interest in the purchase money, cannot, by any stretch of language, be deemed to have relinquished her interest in the

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 MOOKERJEE  
 J.

(1) (1867) 8 W. R. 500.

(2) (1870) 14 W. R. 379.

(3) (1874) 22 W. R. 393.

(4) (1859) 2 Bouldnois 40;

3 I. D. (O. S.) 454.

(5) (1878) I. L. R. 5 Calc. 44.

(6) (1880) 7 C. L. R. 571.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 ———  
 MOOKERJEE  
 J.

estate of her husband; the estate by her action, has, in essence, only undergone a transformation, and the immoveable property has been converted into money which may be shuffled out of sight as land never can be. But if this strict view was not acceptable in 1884 on the ground of *stare decisis*, much less can it be pressed now; I do not, therefore, rest my conclusions on this, the strictly logical view of the matter, especially in view of the fact that if the relinquishment theory is restricted in application only to cases where there is a real relinquishment, that is, a real abandonment by the widow of her interest, the stringency of the rule may be evaded in practice by the execution of a formal deed of relinquishment and a secret payment of consideration to the widow or a separate agreement to pay her maintenance allowance for life. I assume, consequently, as Sir Richard Garth did, that when a widow sells the entire inheritance to the immediate reversioner, she relinquishes her estate in his favour; this view was in substance adopted by Lord Morris in *Behari Lal v. Madho Lal Ahir Gayawal* (1) when he stated that according to Hindu law *the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate*. Beyond this proposition, based, as we have seen, on somewhat questionable grounds, we need not go, and, as I read the judgments in *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (2), we are not required to go even by the Full Bench decision. The principle of that decision is applicable only when the transfer by the widow is of her entire interest in the estate inherited by her from her husband, and is made with the consent of the whole body of immediate reversioners; an extension of that principle to cases

(1) (1891) I. L. R. 19 Calc. 236 ; (2) (1884) I. L. R. 10 Calc. 1102.  
 L. R. 19 I. A. 30.

where either of these elements is absent is not warranted by the language used by the learned Judges, nor can it be deemed a logical development of the principle acknowledged by them as the foundation of their decision.

Upon an examination, then, of the texts and judicial decisions applicable to this matter, and upon a review of the principles which underlie them, the following propositions appear to be deducible :

(i) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title as against the reversionary heir after her death, if he proves that the alienation was made by her for purposes of legal necessity.

(ii) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title as against the reversionary heir after her death, if he proves that he made proper and *bonâ fide* enquiry as to the actual existence of legal necessity, and did all that was reasonable to satisfy himself as to the existence of such necessity.

(iii) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, with the consent of the reversionary heirs, such consent may raise the presumption that the transfer was for legal necessity or that the transferee had made proper and *bonâ fide* enquiries and had satisfied himself as to the existence of such necessity. The *quantum* of consent necessary to raise this presumption depends upon the facts of each particular case, and, in all cases, the presumption raised by such concurrence on the part of the reversioners is rebuttable.

1913  
DEBI  
PROSAD  
CHOWDHURY  
v.  
GOLAP  
BHAGAT.  
MOOKERJEE  
J.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 —  
 MOOKERJEE  
 J.

(iv) When a Hindu widow has alienated her entire interest in the estate inherited by her from her husband, with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs, the transferee acquires a good title as against the actual reversionary heirs at the time of her death.

In view of this exposition of the law, I hold, in entire concurrence with the learned Chief Justice, that the question referred to the Full Bench should be answered as follows :

When an alienation by way of mortgage has been effected by a Hindu widow in respect of a portion of the estate of her husband, with the consent of the next reversioner for the time being, such consent may raise a presumption that the transaction was for legal necessity or that the mortgagee had acted therein after proper and *bonâ fide* enquiry and had satisfied himself as to the existence of such necessity, but this presumption, when it arises, is rebuttable, and it is open to the actual reversioner to establish that there was in fact no legal necessity and that there had been no proper and *bonâ fide* enquiry by the mortgagee.

HOLMWOOD J. I agree with my Lord. The facts of this case and many similar cases which come before the Courts clearly show that the consent of the next reversioners for the time being must be hedged in with safeguards, if there is to be any limit to the widow's powers of alienation.

A spendthrift young man who happens to be the next reversioner at the time of the alienation induces the widow to raise money or mortgage for his benefit to be spent by him on his own immoral or wasteful purposes. The only legal principle upon which such a condition of things could be justified is that the widow has entirely relinquished the estate to the

next reversioner so as to cast on him the whole responsibility for the waste of the ancestral property. In the absence of such relinquishment there must be such a consent by the nearest reversioners as to raise a presumption that the transaction was a fair one and one justified by Hindu law. Such a presumption can only arise with reference to the circumstances of each case.

1913  
 DEBI  
 PRASAD  
 CHOWDHURY  
 v.  
 GOLAP  
 BHAGAT.  
 HOLMWOOD  
 J.

It is unnecessary to refer to those cases which have been dealt with in the judgment delivered by my Lord, where legal necessity is proved or presumed from facts. If the question is answered in the way my Lord the Chief Justice proposes to answer it, it seems to me that all difficulties will be met and salutary check will be put on the extension of the widow's power of alienation which is deprecated by their Lordships of the Judicial Committee in their latest decision.

S. M.

## PRIVY COUNCIL.

P.C.<sup>2</sup>  
1913

Feb. 27,  
March 6,  
April 8.

GULAB SINGH

v.

GOKULDAS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

*Central Provinces Government Wards Act (XVII of 1885) section 18—Application of Act—Hindu joint family estates—Application by managing members of joint family for superintendence of estate by Court of Wards—Mitakshara law, family governed by—Sanction by Chief Commissioner to mortgage of estate under charge of Court of Wards—Suit on mortgage after relinquishment of management by Court of Wards.*

The Central Provinces Government Wards Act (XVII of 1885) applies to the superintendence by the Court of Wards of the estates of Hindu joint families, as well as to the separate estates of Hindus and others situate within the territories administered by the Chief Commissioner of the Central Provinces.

The two managing members of a Hindu joint family governed by the Mitakshara law, and zamindars of the family estate of Baherakhedi in Hoshangabad, which had become overburdened with debt, applied under the above Act to the Deputy Commissioner, as the Court of Wards for the district, to assume superintendence of the joint family estate with a view to liquidate the debts.

*Held*, that in making the application they acted within their power and authority as managing members, and in the interest of all the members of the joint family; and that inasmuch as no member had in the property any definite undivided share [*Gharibullah v. Khalak Singh* (1) and *Appovier v. Rama Subba Aiyar* (2)], what was taken over by the Court of Wards on assuming superintendence of the estate was the property of all the members of the joint family. The Chief Commissioner

\* *Present*: LORD ATKINSON, LORD SHAW, LORD MOULTON, SIR JOHN EDGE, AND MR. AMEER ALI.

(1) (1903) I. L. R. 25 All. 407:      (2) (1866) 11 Moo. I. A. 75.  
L. R. 30 I. A. 165.

had power to sanction the assumption by the Court of Wards of the whole of the joint family property, whether the application was made by the managing members only, or by all the members of the family : and the acts of the Court of Wards in dealing with the property after charge of it was assumed, bound the interests of all the members.

The sanction of the Chief Commissioner to a mortgage of such property as required by section 18 of Act XVII of 1885 may be an implied sanction ; it is not necessary that the mortgage to be made by the Court of Wards should be submitted to the Chief Commissioner for his sanction, nor that the sanction should be to the precise terms of the mortgage deed.

By the terms of a mortgage made in 1891 by the Court of Wards in favour of the respondents (plaintiffs) on the security of the joint family estate, the mortgage money (Rs. 1,20,000) was repayable with interest by annual instalments of Rs. 10,000 extending over more than 20 years, and in the event of Rs. 30,000 becoming overdue the Court of Wards covenanted to recover such sum by sale or otherwise of sufficient of the mortgaged property. If it was found impossible to continue to manage the estate, the Court of Wards was either to sell up the entire property and devote the proceeds to the liquidation of the debt, or make over the estate to the mortgagees in satisfaction of their claim. In the event of the management being relinquished before the debt was liquidated in the ordinary course, the Court of Wards was to liquidate the debt remaining due by the sale of such portion of the property as might be necessary. The sum borrowed was applied to pay off the debts on the property. Only Rs. 16,000 was repaid up to 1893, and since then no instalment had been paid, the Court of Wards, owing to unforeseen circumstances, finding it impossible to pay more, either of principal or interest : and in March, 1902, the Court of Wards, after giving the mortgagees notice that the relinquishment by it of the management had been sanctioned, offered to make over to them the mortgaged property in satisfaction of their claim, "excepting the cultivating rights of *sir* land which are to be reserved for the maintenance of the wards", which the mortgagees declined as not being a compliance with the terms of the mortgage deed. In June, 1902, the Court of Wards relinquished the management of the estate without selling it or transferring it to the mortgagees. In a suit brought in 1904 on the mortgage for sale and recovery of the amount due :—

*Held* (affirming the decisions of the Courts in India). that, on the terms of the mortgage and under the circumstances of the case, the whole sum payable on the mortgage had become due on the relinquishment of the management by the Court of Wards, and the usual decree for sale was made.

1913  
—  
GULAB  
SINGH  
v.  
GOKULDAS.



1913

GULAB

SINGH

v.

GOKULDAS

APPEAL from a decree (7th May, 1907) of the Court of the Judicial Commissioner of the Central Provinces which substantially affirmed a decree (4th April, 1906) of the District Judge of Hoshangabad.

The defendants were appellants to His Majesty in Council.

The facts, shortly stated, were that in July, 1890, Maharaj Singh, the father of the first three appellants, Gulab Singh Tikaram, and Sitaram, and the fourth appellant, Dhulichand, the zamindars of the Bahera-khedi Estate, in the Hoshangabad district, applied to the Deputy Commissioner of that district under the provisions of the Central Provinces Government Wards Act (XVII of 1885) to take over the management of the estate with a view of liquidating their debts, which amounted to Rs. 1,14,000 or thereabouts; and by a notification of the Chief Commissioner, dated 31st January, 1891, their application was sanctioned, and the estate was taken under the superintendence of the Court of Wards of the district, Maharaj Singh and Dhulichand being declared by the notification to be incapable of managing it. The notification is set out in the judgment of their Lordships of the Judicial Committee.

By a mortgage deed, dated 10th December, 1891, (the particulars of which so far as material are also set out in their Lordships' judgment), the then Deputy Commissioner, Mr. E. Gray, for the purpose of paying off the debts of the zamindars, mortgaged the estate for Rs. 1,20,000 to the respondents (plaintiffs), which sum was duly advanced and applied in payment of the debts. The mortgage deed, which was duly registered, was attested by two witnesses, Jagannath Pershad and Ramchandra.

A sum of about Rs. 16,000 was at various times in 1892 and 1893 repaid by the Court of Wards to the

respondents on account of the mortgage debt, but the scheme proposed for payment of the balance of the loan failed, owing to the income of the estate having fallen off after that time, and in 1902 the estate became so hopelessly embarrassed that the Court of Wards, on 13th June of that year, relinquished further superintendence of it, and made it over to the appellants (the sons of Maharaj Singh, who was then dead) and to the appellant Dhulichand.

1913  


---

 GULAB  
 SINGH  
 v.  
 GOKULDAS.

On 22nd September, 1904, the balance of the mortgage money not having been repaid, the respondents brought the suit out of which the present appeal arose, making defendants the appellants and other members of their joint family, and certain formal defendants who held decrees against portions of the mortgaged properties. In their plaint the plaintiffs claimed the sum of Rs. 2,32,403 odd as principal and interest due on the mortgage of 10th December, 1891, and prayed for a decree for sale of the mortgaged properties, or, in the alternative, for equitable relief.

The only defences material on this appeal were those of the first four appellants (defendants), (*a*) that the mortgage deed was not duly attested; (*b*) that it was void because the previous sanction to it of the Chief Commissioner had not been obtained as required by section 18 of Act XVII of 1885; (*c*) that it did not bind the interests of the first three appellants in the properties comprised in it; and (*d*) that the plaintiffs were not entitled to sue for the whole amount due under it.

On these points, the District Judge held (*a*) that, on the maxim *omnia præsumentur rite esse acta*, no proof of actual attestation was necessary, and that the mortgage deed was duly attested in accordance with law; (*b*) that the mortgage deed was not void for want of the previous sanction of the Chief Commissioner;

1913

GULAB

SINGH

v.

GOKULDAS.

no express sanction was necessary, and that it was sufficiently sanctioned might be implied from the circumstances of the case; and might also be presumed under section 114 of the Evidence Act (I of 1872); (c) that the sons' shares in the mortgaged property could not escape from liability in a decree against their fathers, that the mortgage was effected on behalf of their fathers to pay off existing incumbrances which were binding on the fathers and sons alike, and that the contract of mortgage was such that, if entered into by the mortgagors personally, it would have legally bound their sons' interest in the property; and that the mortgage was therefore binding on the interests of Gulab Singh, Tikaram, Sitaram and Himmat Singh in the property; and (d) that the whole amount of the mortgage money became due to the plaintiffs when the Court of Wards made default and relinquished the management without discharging the debt.

The District Judge accordingly passed a mortgage decree in the usual form, under section 88 of the Transfer of Property Act (IV of 1882), for the amount claimed by the plaintiffs.

An appeal by the defendants was preferred to the Court of the Judicial Commissioner (Mr. H. V. DRAKE-BROCKMAN) who on the first point (a) held that the plaintiffs were not bound to examine Mr. Gray (the Deputy Commissioner who acted as the Court of Wards) on commission, and it was too late now for the defendants to object that secondary evidence of Ramchandra's signature should not have been omitted, failing proof that he is dead or untraceable after diligent search. "Upon the question whether the attestation by Jagannath and Ramchandra met the requirements of the law I hold that the plaintiffs were bound to establish that those persons saw Mr. Gray execute the mortgage deed, but

that in the circumstances it is safe to presume that they did so."

As to (b) the Judicial Commissioner, after remarking that he had addressed the Secretariat with a view to make sure whether the Chief Commissioner had ever sanctioned the mortgage as such, and that the reply was in the negative, continued—

"I must therefore dissent from the District Judge's view that the sanction of the Chief Commissioner must be implied. At the same time I hold that the absence of sanction does not operate to make the mortgage void. That the transaction was unfavourable to the wards has not been pleaded. It appears that the entire estate was not covered by the mortgage, and that all the creditors were paid off at once with the money borrowed from the plaintiffs, while the terms of the mortgage are, on the face of them, such as no ordinary borrower in this country could hope to obtain in the open market. I hold that upon a reasonable construction of section 18 of Act XVII of 1885 the mortgage could not be more than voidable, and that in the circumstances it was for the wards' benefit and should be upheld."

On (c) the Judicial Commissioner concurred with the District Judge in holding that the mortgage bound the interests of the defendants Gulab Singh, Tikaram, Sitaram and Himmat Singh, and as to (d) the Judicial Commissioner said—

"The clauses of the mortgage to be interpreted are :—

'And it is further agreed and declared that in the event of three successive instalments or of arrears equivalent to the sum of three instalments (Rs. 30,000) becoming overdue the said Court of Wards on behalf of the mortgagors does hereby covenant to recover such sum by sale or otherwise of any requisite portion of the property herein hypothecated to the said mortgagees.

'And it is further agreed that it (the Court of Wards) will not relinquish management of the estate till such time as the debt is liquidated in ordinary course, or in the event of management being relinquished before such time liquidate the debt remaining due by sale of such portion of the property as may be necessary or otherwise.'

"The earlier of the two clauses quoted seems clearly to contemplate a sale for the recovery of Rs. 30,000 as soon as sums overdue reach that figure, but the other clause contemplates sale before sale is relinquished for the liquidation of 'the debt remaining due,' and this unmistakeably as

1913

GULAB  
SINGH  
v.

GOKULDAS.

1913

GULAB  
SINGH

v.

GOKULDAS.

the final step in the entire transaction. I think, therefore, that 'the debt remaining due' must mean the balance of the principal advanced plus all interest already overdue. The defendants contend that the plaintiffs cannot rely on this later clause because they allowed the Court of Wards to relinquish the management without selling. It appears, however, that the sale was not affected because the price of land ruled low—as it had done for 10 years back—at the time of relinquishment. Moreover, the plaintiffs could not control the Court of Wards in this matter: see sections 26 and 29 of Act XVII of 1885. The property was hypothecated and there was a promise to pay the entire balance before relinquishment. The owners must, I think, be treated as taking over the burden of the hypothecation and the promise alike, for it is not essential to the sale that the Court of Wards itself should sell."

The Judicial Commissioner made a decree substantially confirming that of the District Judge.

On this appeal,

*G. R. Lowndes*, for the appellants, contended that the mortgage deed was not proved to have been executed as required by law: evidence was given on behalf of the respondents identifying the signatures of Mr. Gray and Ramchandra, but no evidence was offered that the signature of Mr. Gray was made in the presence of the alleged attesting witnesses, as was required by section 59 of the Transfer of Property Act (IV of 1882), nor was there any attestation clause. The Courts below were wrong in presuming that the attestation had been rightly made. It was also contended that the mortgage was void for want of the previous sanction thereto of the Chief Commissioner. Without such sanction, as required by section 18 of Act XVII of 1885\* the Court of Wards had no power

\* Act XVII of 1885, section 18 :—"The Court of Wards may let the whole or any part of the property of any Government ward under its superintendence and may, with the previous sanction of the Chief Commissioner, mortgage, sell, or exchange the whole or any part of such property, and may do all such other acts as it may judge to be best for the benefit of the property and the advantage of the Government ward."

to mortgage the property, and the mortgage was consequently, it was submitted, void and not binding on the appellants: see section 7 of the Transfer of Property Act (IV of 1882). The sanction could not be implied, as has been held by the Judicial Commissioner. The letter of the Chief Commissioner, dated 28th January, 1891, in which he "sanctions an allowance of Rs. 883 per annum for the maintenance of the proprietors, and accepts the proposals for the liquidation of the debts", was, therefore, not under section 18 a sufficient sanction, which it was contended meant a sanction after the discretion of the Chief Commissioner had been exercised on the question of the desirability of the mortgage being made, and of its terms, if made.

Further, the mortgage, if not void, was only valid so far as the property of the wards was concerned, and therefore it was only binding on the interests of Maharaj Singh and Dhulichand, and did not affect the interests of the appellants Gulab Singh, Tikaram and Sitaram. It had been wrongly held by the Courts in India that the mortgage deed was binding on the interests of all the appellants. The sons of Maharaj Singh and Dhulichand were not wards of Court, and their interests were not mentioned in, or dealt with, by the mortgage deed.

But even if the mortgage was valid and binding on all the appellants, the whole sum of Rs. 2,32,403 for which a decree had been passed was not due under the mortgage. The only liability imposed by the mortgage deed upon Maharaj Singh and Dhulichand was to repay the loan and interest by the specified instalments of Rs. 10,000 each, the final payment of which would become payable in 1914. The Courts below had held, erroneously it was contended, that when the Court of Wards relinquished the superintendence of the estate the whole of the mortgage

1913  
GULAB  
SINGH  
v.  
GOKULDAS.

1913  
GULAB  
SINGH  
v.  
GOKULDAS.

money became due to the respondents, the Appellate Court relying on the clauses of the deed set out in its judgment.

*DeGruyther, K. C.* and *J. M. Parikh*, for the respondents, contended that the Courts below had rightly held that the mortgage deed was attested in conformity with the requirements of the law, and was executed as required by section 18 of Act XVII of 1885, with the sanction of the Chief Commissioner, which was to be inferred from the correspondence, and other circumstances of the case: and it was valid and binding on the appellants. But apart from the provisions of that Act the mortgage deed, it was submitted, bound the interests of all the members of the joint family, and not only of those who applied that the estate should be taken under the superintendence of the Court of Wards. By that application the applicants constituted the Deputy Commissioner their agent for the purposes of the management of the estate, under clause 4 of section 7 of Act XVII of 1885, and the Court of Wards thenceforth had the same power to deal with the estate as the applicants, who were the managers of the joint family, previously had. But the managing members of the joint family had, before their petition to the Court of Wards, power to make all the other members liable for debts contracted reasonably for the benefit and in the course of the proper management of the joint family property, and all the members would have been liable for all the debts. Under the mortgage made, therefore, by the Court of Wards all the members of the family were similarly liable. Reference was made to the case of *Reversion Fund and Insurance Company, Ltd v. Maison Cosway Limited* (1) and the authorities there cited, in which it was held that, where the managing

director of a company, who was prohibited from borrowing money on behalf of the company unless specially authorised by them, borrowed without such authority money from the plaintiffs, which he applied to the discharge of existing legal debts of the company, the plaintiffs, although aware that the director had no special authority, were entitled to recover from the company the money they had advanced. So here the Court of Wards borrowed money which was used to pay off antecedent debts of the family, and even if they had had no authority, which was not the case here, the appellants were all liable for the money so expended, which the respondents were entitled to recover. In the joint family, moreover, no member, until partition, had any definite share in the joint undivided property. Reference was made to *Appovier v. Rama Subba Aiyar* (1); Mayne's Hindu Law, 7th Ed. page 480 paragraph 363; *Madho Parshad v. Mehrban Singh* (2); *Gharibullah v. Khalak Singh* (3), Act XVII of 1885, section 2; and Bengal Regulation LII of 1803, preamble. The Court of Wards had power to deal with all the property. Reference was also made to Act XVII of 1885, section 3, the definition of "Government Ward", and section 6, under which property could not be taken over by the Court of Wards unless the manager or proprietor came under the term "landholder", for the meaning of which term the Central Provinces Land Revenue Act (XVIII of 1881) section 3, clause 9 (where it means a "malguzar") was cited. The Court of Wards took over the rights and obligations, whatever they were, of the malguzar; that would be the rights of the Government wards in the property. Taking over the property

1913  


---

 GULAB  
 SINGH  
 v.  
 GOKULDAS.

(1) (1866) 11 Moo. I. A. 75.

(3) (1903) I. L. R. 25 All. 407 ;

(2) (1890) I. L. R. 18 Calc. 157 ;

L. R. 30 I. A. 165.

L. R. 17 I. A. 194.



1913  
 ———  
 GULAB  
 SINGH  
 v.  
 GOKULDAS.

included the right of management. The Court of Wards would not have greater power than the ward would have had, had he acted for himself. Act XVII of 1885, sections 11, 12, 14, 16, 17 and 20, were also referred to.

The Courts in India were right in holding that when the Court of Wards relinquished the management of the estate, the whole amount due on the mortgage became due, and the respondents were entitled to that amount for which the decree had been made.

*Lowndes*, in reply. The debts of the "zamindars" (managers of the joint family) were not all family debts. The other members of the family would not be liable for the personal debts of the managers. Reference was made to Act XVII of 1885, section 3. The other members were not Government wards.

The judgment of their Lordships was delivered by  
*April 8.* SIR JOHN EDGE. This is an appeal from a decree, dated the 7th May, 1907, of the Judicial Commissioner of the Central Provinces, which affirmed with slight modifications a decree, dated the 4th April, 1906, of the District Judge of Hoshangabad.

The suit in which the appeal arose was brought on the 22nd September, 1904, in the Court of the District Judge of Hoshangabad by mortgagees upon a mortgage of immovable property which was made on the 10th December, 1891, by the Deputy Commissioner of the district of Hoshangabad, as and being the Court of Wards for that district. The suit was one for possession of the mortgaged property, including the *sir* lands, or alternatively for a decree for sale. Certain other alternative reliefs were claimed.

The defences to the suit, so far as they are now material, were that the mortgage had, it was alleged, been made by the Deputy Commissioner without the

previous sanction of the Chief Commissioner, and was void; that the property mortgaged was the undivided ancestral property of a joint Hindu family under the rules of the Mitakshara, and that the Court of Wards had no right or authority to mortgage the shares, rights, or interests of those members of the family who were not Government wards or who were minors; and that no decree for sale, or for possession, or for any of the alternative reliefs could be made.

1913  
GULAB  
SINGH  
v.  
GOKULDAS.

The District Judge, on the 4th April, 1906, having found that there was then due on the mortgage Rs. 2,32,403 for principal and interest, made a conditional decree for sale. From that decree only the defendants Gulab Singh, Tikaram, Sitaram, Dhulichand, son of Pemsha, and Himmat Singh, who are the appellants here, appealed to the Court of the Judicial Commissioner. The Judicial Commissioner, on the 7th May, 1907, on appeal, slightly varied the decree of the District Judge and added a declaration that the defendants will not be personally liable for any sum by which the sale proceeds of the mortgaged property may fall short of the amount due for the time being on the mortgage, and in other respects affirmed the decree for sale of the District Judge, with costs of the appeal to his Court against the then appealing defendants. On the 25th August, 1908, the then District Judge of Hoshangabad, finding that the defendants had not paid into Court or to the plaintiffs Rs. 2,67,871-10-8, principal, interest and costs, made a decree absolute for sale of the mortgaged property specified in a schedule to that decree, and allowed interest on the decreed sum from the 24th July, 1908, until liquidation, adding the declaration which had been made by the Judicial Commissioner.

For the purposes of this appeal it is necessary to refer as briefly as may be to the facts antecedent to

1913  
GULAB  
SINGH  
v.  
GOKULDAS.

the commencement of this suit. On or shortly before the 1st July, 1890, Maharaj Singh, now dead, and his brother Dhulichand, a defendant to this suit, who described themselves as zamindars of Baherakhedi, Bagalkhedi, Patlai, Punwasa, Bamuria and Sarora, Pargana Hoshangabad, made a written application to the Deputy Commissioner of Hoshangabad, in which they stated that they were indebted to the extent of about Rs. 1,14,358-11-9; that they were neither able to arrange for the liquidation of the debt nor to manage the estate; and that if the villages should be lost on account of the indebtedness—

“Our children will have no estate left to them;” and prayed that “if, under section 7 (c) clause 4, of Act XVII. of 1885, you be pleased to assume the management of our malguzari villages of Baherakhedi and others, and to arrange for the discharge of our debt in any way possible, our estate will be saved and our children will thereby be able to maintain themselves, for which they will ever remain grateful to you. The rest lies with you”.

The villages mentioned in the petition were the undivided ancestral property of a joint Hindu family governed by the rules of the Mitakshara, and Maharaj Singh and Dhulichand, who were brothers, were the senior and managing members of that family. At that time the joint family consisted of Maharaj Singh, his son, Gulabsingh, then about 36 years old, Tikaram, then about 21 years old, and Sitaram, then about nine years old; and Dhulichand and his sons, Himmat Singh, then about 22 years old, Bajilal, then about 16 years old, Fatichand, then about 8 years old, and Jaganath, then about 5 years old, and a son of Gulab Singh, named Dinanath, who was then about 8 years old. The indebtedness of the family in respect of which the property was liable to be lost amounted to about Rs. 1,20,000. As will later appear, the petition was duly forwarded to the Chief Commissioner for his sanction to the Court of Wards assuming the

superintendence of the property mentioned in the petition; that sanction was given, and in the result the mortgage was made upon which this suit was brought.

Having regard to the defences which were set up in this suit, it is necessary to consider with what object that petition was presented to the Deputy Commissioner, and what authority, if any, Maharaj Singh and Dhulichand had to bind the other members of the joint family by their action in presenting the petition. It has been contended on behalf of the appellants that Maharaj Singh and Dhulichand had power to bind only their own individual interests in the joint property, and that if their object was to get the Court of Wards to assume the superintendence of the joint family property, they acted without authority, and their action could not and did not bind the other members of the joint family.

Maharaj Singh and Dhulichand were zamindars, and were the malguzars of the property mentioned in their petition, and were, as their Lordships have said, the senior and managing members of the joint family of which the property mentioned in their petition was the ancestral property. The application was made under the Central Provinces Government Wards Act, 1885, Act XVII of 1885. The application was not drawn up with the precision with which it probably would have been drafted by a trained lawyer, but, as has been pointed out by this Board in more than one appeal, the art of conveyancing is but little understood in the country parts of India. It must, in their Lordships' opinion, be taken that in making the application to the Deputy Commissioner, Maharaj Singh and Dhulichand were acting in their capacity as the managing members of the joint family, and not merely as two members of the family applying only in their own individual interests.

1913

GULAB  
SINGH  
v.

GOKULDAS.

1913  
 GULAB  
 SINGH  
 v.  
 GOKULDAS.

It appears to their Lordships to be obvious that the intention of Maharaj Singh and Dhulichand in making that application was that the Court of Wards should in the interests of all the members of the joint family assume the superintendence of the immoveable property which was the ancestral property of the joint family, and not merely the management and superintendence of the then unascertained and unpartitioned shares in the joint property which, on a partition of that property, not then in contemplation, might possibly come to Maharaj Singh and Dhulichand. Neither Maharaj Singh nor Dhulichand had more than the mere coparcenary interest of a member of the joint family in the family property. Neither of them had any defined share. It was held by this Board in 1903 in *Gharib-ullah v. Khatak Singh* (1) that the interest of a member of an undivided Mitakashara family in the family property is not individual property. It had previously been held by this Board in 1866 in *Appovier v. Rama Subba Aiyar* (2) that no member of a joint Hindu family, whilst it remains undivided, can predicate of the joint or undivided property that he has a certain definite share. It has not been shown to their Lordships that it was the practice of the Courts of Wards of the Central Provinces to assume the superintendence of the unpartitioned interests of some only of the members of a joint Hindu family in the family property, nor has it been explained in this appeal how a joint family property could be preserved for the members of a joint family by a Court of Wards assuming the superintendence of the unpartitioned interests of some only of the members of the family. Under the circumstances of the family, Maharaj Singh and Dhulichand acted prudently and in

(1) (1903) I. L. R. 25 All. 407 : (2) (1866) 11 Moo. I. A. 75.

L. R. 30 I. A. 165.

the best interests of the joint family in applying to the Deputy Commissioner of Hoshangabad to have the family property taken under the management of the Court of Wards, and in their Lordships' opinion Maharaj Singh and Dhulichand in making that application acted within their powers and authority as the managing members of the joint family.

Before, apparently, that formal application was made, the Deputy Commissioner had been in communication with the plaintiffs' firm to ascertain the terms upon which they would advance the money required for the liquidation of the then indebtedness of the family, on the security of the immovable property of the family, which he described in a letter of the 21st June, 1890, as consisting of five whole villages, a 12 annas share in another village, and 20 plots held on absolute occupancy tenures in different villages. In that letter the Deputy Commissioner enclosed "a list of the property it is proposed to hypothecate, with particulars as to income and expenditure". It is obvious that from the first it was on the security of a mortgage of the ancestral property of the family that it was intended to obtain a loan from the plaintiffs.

On the 1st July, 1890, the Deputy Commissioner of Hoshangabad forwarded to the Commissioner of the Nerbudda Division the application of Maharaj Singh and Dhulichand, praying that their estate might be taken under the management of the Court of Wards and having mentioned his estimate of the then indebtedness as Rs. 1,14,358-11-9, the annual income of the property and the outgoings, and that it was proposed to borrow Rs. 1,00,000 from the plaintiffs' firm, he recommended that the Chief Commissioner should be asked to sanction the assumption of the management of the property by the Court of Wards until the liabilities of the family should be liquidated. There

1913

GULAB  
SINGH  
v.  
GOKULDAS

1913  
 —  
 GULAB  
 SINGH  
 v.  
 GOKULDAS.

was some further correspondence between the Deputy Commissioner, the Commissioner of the Nerbudda Division, and the Secretariat of the Central Provinces, and ultimately, on the 28th January, 1891, the Commissioner of the Nerbudda Division was informed by the Secretariat that the Chief Commissioner had sanctioned the assumption by the Court of Wards, Hoshangabad, of the management of the estate of Maharaj Singh and Dhulichand, malguzars of Baherakhedi and other villages in that district, and had also sanctioned an allowance of Rs. 883 per annum being made for the maintenance of the proprietors, and accepted the proposals for the liquidation of the debt. What were the precise terms of those proposals does not appear from the papers which are before the Board, but it may be assumed from the papers which are before the Board that the proposals which were approved by the Chief Commissioner included a proposal to obtain from the plaintiffs' firm, on the security of a mortgage of the ancestral property, a sum sufficient to liquidate the then indebtedness of the family.

On the 31st January, 1891, the following official notification appeared in the "Central Provinces Gazette"—

"No. 609.—Declaration by the Chief Commissioner under section 7 (1) (c) of the Central Provinces Government Wards Act (XVII of 1885).

"The Chief Commissioner is pleased to declare Maharaj Singh and Dhulichand, malguzars of Baherakhedi in the Hoshangabad District, on their own application, incapable of managing their property, and has sanctioned the assumption of its superintendence by the Court of Wards of that district."

The property referred to in that notification must, in their Lordships' opinion, be deemed to have been all the immovable property which constituted the ancestral estate of the joint family which was under the management of Maharaj Singh and Dhulichand, and was referred to in their application. It was that

ancestral property which it had been proposed by the Deputy Commissioner should be taken under the superintendence of the Court of Wards until the liabilities of the family should be liquidated. It was by a mortgage of that property that it was intended to raise a sum sufficient to liquidate the indebtedness of the family. It could not have been intended that the Court of Wards should take over the management and superintendence of the family property so far only as the unpartitioned interests of Maharaj Singh and Dhulichand in the joint family property were concerned; if that had been the object, it would have frustrated the intention with which the proposal was made, that the superintendence of the property should be assumed by the Court of Wards.

One effect of the notification was expressly to disqualify Maharaj Singh and Dhulichand to manage the family property. It could not have been intended that they should be disqualified so far only as their own unpartitioned interests in the property were concerned, and that they should be qualified to manage the property so far as the interests of the other members of the family were concerned; nor could it have been intended that the Court of Wards and the members of the joint family, other than Maharaj Singh and Dhulichand, should jointly manage the unpartitioned family property.

Act XVII of 1885 was not as precisely worded as it might have been, but it obviously was intended to apply to the superintendence by the Court of Wards of the family property of Hindu joint families as well as to the superintendence of separate property of Hindus and others situate within the territories for the time being administered by the Chief Commissioner of the Central Provinces. In passing Act XVII of 1885 the Indian Legislature could not have been

1913  
GULAB  
SINGH  
v.  
GOKULDAS.



1913  
GULAB  
SINGH  
v.  
GOKULDAS.

unaware that much of the immovable property held by Hindus within these territories was family property of joint Hindu families. It is difficult to see how the Court of Wards could exercise some of the powers entrusted to it under the Act, as, for example, the power of letting the whole or any part of the property of Government wards under its superintendence, or could perform the duties of superintendence, which included the management and collection of rents, unless in such a case as this the Chief Commissioner was entitled under the Act to sanction the assumption by the Court of Wards of the superintendence of the family property of the joint Hindu family, whether the application that the property should be taken under the management of Court of Wards was made by all the members of the family, or by the managing members only. Their Lordships are of opinion that the Chief Commissioner had power to sanction the assumption by the Court of Wards of Hoshangabad of the superintendence of the joint family property which was the property mentioned in the application of Maharaj Singh and Dbulichand.

It must in their Lordships' opinion be inferred from the letter of the 28th January, 1891, from the Secretariat to the Commissioner of the Nerbudda Division, that the Chief Commissioner of the Central Provinces had given his sanction to the proposal that the Court of Wards of the district of Hoshangabad should mortgage the property of the family in order to raise a sum sufficient for the liquidation of the indebtedness. It was not, in their Lordships' opinion, necessary under section 18 of Act XVII of 1885 that the actual mortgage to be made by the Court of Wards should be submitted to the Chief Commissioner for his sanction, nor was it necessary that the Court of Wards should have his sanction to the precise terms of the

mortgage. The sanction which is to be inferred from the letter of the 28th January, 1891, empowered the Court of Wards to mortgage the property under section 18 of Act XVII of 1885.

1913  
 GULAB  
 SINGH  
 v.  
 GOKULDAS.

It having been agreed between the Court of Wards and the plaintiffs' firm that they should advance Rs. 1,20,000 on the security of a mortgage of the family property, the plaintiffs' firm, in March 1891, advanced the Rs. 1,20,000, and by the 25th March, 1891, the Court of Wards with the money so advanced discharged the then indebtedness of the family. On the 10th December, 1891, the Court of Wards of Hoshangabad in the exercise of its statutory power made the mortgage upon which this suit has been brought. In their Lordships' opinion the Court of Wards had obtained from the plaintiffs' firm most favourable terms for the loan, although, owing to the unforeseen circumstances, the object of saving the property for the family has not been attained.

By the mortgage all the right, title, and interest of the mortgagors in the property mentioned in the first schedule to the mortgage, together with all actual and reputed rights, easements, and appurtenances to the same, and all cultivated and uncultivated land, groves, *abadi*, *sir*, rents, and profits, by whatever name the same should be known, were hypothecated by way of mortgage to the mortgagees. The mortgage money was to be repaid with interest by annual instalments extending over more than 20 years. It was agreed that in the event of Rs. 30,000 becoming overdue the Court of Wards should recover such sum by sale or otherwise of sufficient of the hypothecated property.

The mortgage deed also contained the following important clauses:—

“And it is further agreed that the Court of Wards shall continue to manage this estate so long as there is any prospect of the debt being repaid

1913

GULAB  
SINGH

v.

GOKULDAS.

from income of the same, and that if from any cause this should appear impossible, that the Court of Wards shall, if the mortgagors so desire, either sell up the entire property or so much as may be necessary and devote the proceeds to liquidation of the debt, or make the estate over to the mortgagees if they prefer this course in satisfaction of their claims, and that upon such sale or transfer all further liabilities on the part of the Court of Wards towards the mortgagees shall cease.

“ And it is further agreed that it will not relinquish management of the estate till such time as the debt is liquidated in ordinary course, or in the event of management being relinquished before such time, liquidate the debt remaining due by sale of such portion of the property as may be necessary or otherwise.”

During the years 1892 and 1893, the Court of Wards paid to the mortgagees Rs. 16,000. Since then no instalment has been paid. The Court of Wards, owing to unforeseen circumstances, found it impossible to pay the balance of the mortgage debt or any other instalments or interest, and on the 10th December, 1901, the plaintiffs called upon the Court of Wards either to put them in possession of the mortgaged property or to pay the sums due under the mortgage. On the 13th March, 1902, the Deputy Commissioner of Hoshangabad, who was the Court of Wards, by letter of that date, gave the plaintiffs notice that the relinquishment of the management of the estate by the Court of Wards had been sanctioned, and offered to make over to them the mortgaged portion of the estate—

“ in full satisfaction of your claims with all outstanding rental arrears and debts, excepting the cultivating rights in *sir* land which are to be reserved for the maintenance of the wards.”

It is to be observed that in that letter the members of the joint Hindu family were treated as Government wards. The offer to hand over the mortgaged property less the *sir* lands was not in compliance with the contract in that respect in the mortgage deed, and was declined. On the 23rd August, 1902, it was officially notified that the superintendence of the estate of the

family had, with the sanction of the Chief Commissioner, been relinquished by the Court of Wards with effect from the 12th June, 1902. The mortgaged property was not sold by the Court of Wards, the mortgage debt, with the exception of Rs. 16,000 which was paid in 1892 and 1893, has not been paid, and the Court of Wards did not transfer the mortgaged property to the mortgagees, and the management of the estate was relinquished by the Court of Wards. Their Lordships are of opinion that under these circumstances the moneys remaining unpaid under the mortgage became payable, and the plaintiffs were entitled to bring this suit for sale. Their Lordships will humbly advise His Majesty that the decree of the Judicial Commissioners should be affirmed, and that this appeal should be dismissed. The appellants must pay the costs of this appeal.

1913  
GULAB  
SINGH  
v.  
GOKULDAS.

*Appeal dismissed.*

Solicitors for the appellants: *Downer & Johnson.*

Solicitors for the respondents: *T. L. Wilson & Co.*

J. V. W.

## APPELLATE CIVIL.

*Before Mookerjee and Holmwood JJ.*

1912

Aug. 1.

MATHURA PRASAD

v.

TOTA SINGH.\*

*Abwab—Illegal cess—Rent—Bengal Tenancy Act (VIII of 1885), s. 74—  
Regulation VIII of 1793, ss. 54 and 55—Contract.*

If, upon a fair interpretation of the terms of the contract, the sum claimed can be deemed part of the actual rent, the tenant is bound to pay it; if, on the other hand, the sum claimed can only be regarded as an imposition in addition to the actual rent, the stipulation for its payment is void.

Under a lease of certain lands the yearly rent was specified as assessed at a certain rate, and at the end of the lease, in a clause entirely distinct from the one wherein the rent was assessed, a provision was made for the delivery of husk, which was not expressly or by implication made part of the rent. The plaintiffs brought a suit for arrears of rent on the basis of this lease, claiming a deduction of a certain sum of money for unculturable lands, and seeking to recover arrears of rent besides husk. They further claimed cesses upon the amount stated to be rent, and not upon the amount claimed as price of the husk :

*Held*, that the sum claimed as the value of the husk did not form part of the consolidated rent, but was an independent item falling within the description of an imposition in addition to the actual rent.

*Sonnum Sookul v. Shaikh Elahee Buksh* (1), *Raj Narain Mitra v. Panna Chand Singh* (2), *Gayratulla Sardar v. Girish Chandra Bhaumik* (3), *Krishna Chandra Sen v. Sushila Soondury Dassee* (4), *Sreekanta Prasad v. Irshad Ali Sircar* (5) approved.

\* Appeal, from Appellate Decree, No. 2357 of 1908, against the decree of J. C. Twidell, District Judge of Bhagalpore, dated July 20, 1908, modifying the decree of Lalit Kumar Bose, Subordinate Judge of Bhagalpore, dated April 6, 1908.

(1) (1876) 7 W. R. 453.

(3) (1907) 12 C. W. N. 175.

(2) (1902) 7 C. W. N. 203.

(4) (1899) I. L. R. 26 Calc. 611,

(5) (1894) 16 C. L. J. 225.

*Radha Charan Ray Chowdhry v. Golak Chandra Ghose* (1), distinguished.

*Tilukhdari Singh v. Chulhan Mahton* (2), *Radha Prasad Singh v. Bal Kowar Koeri* (3), referred to.

1912

MATHURA  
PRASAD  
v.

TOTA SINGH.

SECOND APPEAL by Mathura Prasad and others, the plaintiffs.

This was a suit brought by one Mathura Prasad, subsequently represented by his heir and legal representative, Krishna Prasad, and others against Tota Singh and others for recovery of Rs. 1,356-4 on account of arrears of rent with cesses and damages and the price of *bhusa* (husk of wheat and gram) for the years 1311 to 1314 F. S. in respect of 69 bighas of land. Under a lease, dated the 18th September 1877, the defendants held in *jote* 77 bighas 14 cottahs and 13 dhurs of land at an annual rent of Rs. 3-4 per bigha, and it was agreed to pay the plaintiffs the sum of Rs. 252-6-7 as rent for this land in the month of *Baisak* of each year together with Rs. 7 as cesses thereon, and, in the event of default of such payment, to pay interest at the rate of 2 per cent. *per mensem*. It was further agreed to supply annually four cart-loads of husk to the plaintiffs, and in default to pay the price thereof at the rate of Rs. 5 per cart-load. In their plaint the plaintiffs claimed the annual rent of Rs. 231-4, inclusive of cesses, in respect of only 69 bighas of land, after allowing a deduction of 8 bighas 14 cottahs and 13 dhurs of the land specified in the lease, on account of ditches, road, temple and garden. They further claimed an annual charge of Rs. 40 for non-delivery of the four cart-loads of husk at the market rate, and damages at the rate of 25 per cent. and in their prayer they asked for the payment of the sum of Rs. 1,356-4, the amount of rent with cesses and

(1) (1904) I. L. R. 31 Calc. 834. (2) (1889) I. L. R. 17 Calc. 131.

(3) (1890) I. L. R. 17 Calc. 726.

1912  
 MATHURA  
 PRASAD  
 v.  
 TOTA SINGH.

damages and the price of the husk. Some of the co-sharers of the plaintiffs, who did not join in bringing the suit, were made defendants 2nd party, and the claim for their share was given up. The Court of first instance decreed the suit, but, on appeal, this decree was set aside only with respect to the value of the husk and the damages claimed thereon. The plaintiffs, thereupon, appealed to the High Court.

*Babu Jogesh Chandra Dey*, for the appellants. My submission is that the husk was an integral part of the rent, being blended with it and, therefore, not an *abwab*. I rely on the case of *Radha Charan Ray Chowdhry v. Golak Chandra Ghose*(1). There the collection charges were payable annually. So was the husk in the present case. See also the case of *Mahomed Fayez Chowdhry v. Jamoo Gaze* (2).

*Babu Khetra Mohan Sen*, for the respondents. On the construction of the lease the annual rent was fixed at the rate of Rs. 3-4 per bigha for the 77 bighas 14 cottahs and 13 dhurs of land. Nowhere has it been stated that the rent was partly *nakdi* (payable in cash) and partly *bhowli* (payable in kind). In the lease a distinction was made between the delivery of the husk and the payment of yearly rent, inasmuch as it is stated therein that on failure to pay the yearly rent, interest was payable at the rate of two *per cent. per mensem*. Therefore, the husk did not form an integral part of the rent. The case of *Radha Charan Ray Chowdhry v. Golak Chandra Ghose* (1) is distinguishable; for there the collection charges were made part and parcel of the rent. Furthermore, the road-cess was calculated on the rent alone. The husk was not taken into account in assessing the road-cess, and throughout the plaintiffs' entire claim, as set up

(1) (1904) I. L. R. 31 Calc. 834. (2) (1882) I. L. R. 8 Calc. 730.

in the plaint, a distinction has been drawn between rent and husk, separating them as two distinct charges.

*Babu Jogesh Chandra Dey*, in reply. The rent and husk go together. There is nothing to distinguish the one from the other. My submission is that the non-calculation of the road-cess on the price of the husk is not sufficient to make the latter an *abwab*. Unlike other cases, husk is a by-product and not a manufactured article and can be realised as rent.

1912

MATHURA

PRASAD

v.

TOTA SINGH.

MOOKERJEE AND HOLMWOOD JJ. This is an appeal on behalf of the plaintiff in a suit for recovery of arrears of rent. The sole question in controversy is whether an annual sum of Rs. 40 claimed by the plaintiff falls within the description of an illegal imposition within the meaning of section 74 of the Bengal Tenancy Act. The defendants hold under a lease dated the 18th September 1877. In this instrument, the area of the land is stated to be 77 bighas 14 cottahs and 13 dhurs whereon rent is assessed at the rate of Rs. 3-4 a year per bigha ; the total rent is stated to be Rs. 252-6-7 to be paid in one instalment in the month of Baisak, and, in the event of default of payment, to carry interest at the rate of two per cent. per month. In the concluding portion of the lease, it is further stated that the tenant would deliver annually four cart-loads of husk of wheat and gram, and that if he failed to deliver the husk according to the terms of the contract, he would pay for the price thereof at the rate of Rs. 5 per cart-load. The plaintiff claimed in the Court below the price of the four cart-loads of husk at the present market rate, namely, Rs. 10 per cart-load. The defendant resisted the claim on the ground that this was an imposition in addition to the actual rent, within the meaning of section 74 of the Bengal Tenancy Act and that, consequently, the



1912  
 ———  
 MATHURA  
 PRASAD  
 v.  
 TOTA SINGH.

only annually. The decisions mentioned thus all clearly tend to negative the contention of the appellants. Much reliance, however, has been placed in support of the appeal upon the case of *Radha Charan Ray Chowdhry v. Golak Chandra Ghose* (1). But that case is clearly distinguishable. There the amount sought to be recovered as collection charge was not only expressly made part of the rent and consolidated therewith, but the aggregate amount was distributed into various instalments expressly stated to be payable as instalments of rent. In the case before us, even if there were, upon the terms of the contract, any doubt as to the true nature of the sum sought to be recovered, that doubt would be completely removed upon an examination of the plaint. In the fourth paragraph of the plaint, the plaintiff allows a deduction of Rs. 28-6 for unculturable land and seeks to recover arrears at an annual rate of Rs. 231, besides the husk; in the sixth paragraph, he asks for the principal amount of rent with cesses thereon, and the price of the husk. These two paragraphs plainly indicate that, in the opinion of the plaintiff, at any rate, the price of the husk claimed is not an integral part of the rent. The matter, however, is placed beyond all doubt when we find that the plaintiff claims cesses only upon the amount stated to be rent, and not upon the amount claimed as price of husk. If the latter amount had borne the character of rent, the plaintiff would have been entitled to claim cesses thereon, and what is more, he would have been liable to pay to the State cesses on the basis of the rent thus realised. In our opinion, the terms of the contract, as also the interpretation put thereon by the plaintiff himself, leave no room for serious controversy that the sum claimed as the value of the husk

does not form part of the consolidated rent, but is an independent item falling within the description of an imposition in addition to the actual rent, though it may not have been specifically described in the contract, or claimed in the plaint under the denomination of *abwab*, as was done in some of the cases in the books. *Tilukhdari Singh v. Chulhan Mahton* (1), *Radha Prasad Singh v. Bal Kowar Koeri* (2). The view we take is amply supported by the decision in *Sreekanta Prasad v. Irshad Ali Sircar* (3), which has many features in common with the case now before us.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs. The cross objection filed on behalf of the respondent is not pressed, and is, consequently, dismissed without costs.

O. M.

*Appeal dismissed*

- (1) (1889) I. L. R. 17 Calc. 131.      (2) (1890) I. L. R. 17 Calc. 726.  
(3) (1894) 16 C. L. J. 225.

1912  
MATHURA  
PRASAD  
v.  
TOTA SINGH.

1912  
MATHURA  
PRASAD  
v.  
TOTA SINGH.

only annually. The decisions mentioned thus all clearly tend to negative the contention of the appellant. Much reliance, however, has been placed in support of the appeal upon the case of *Radha Charan Ray Chowdhry v. Golak Chandra Ghose* (1). But that case is clearly distinguishable. There the amount sought to be recovered as collection charge was not only expressly made part of the rent and consolidated therewith, but the aggregate amount was distributed into various instalments expressly stated to be payable as instalments of rent. In the case before us, even if there were, upon the terms of the contract, any doubt as to the true nature of the sum sought to be recovered, that doubt would be completely removed upon an examination of the plaint. In the fourth paragraph of the plaint, the plaintiff allows a deduction of Rs. 28-6 for unculturable land and seeks to recover arrears at an annual rate of Rs. 231, besides the husk; in the sixth paragraph, he asks for the principal amount of rent with cesses thereon, and the price of the husk. These two paragraphs plainly indicate that, in the opinion of the plaintiff, at any rate, the price of the husk claimed is not an integral part of the rent. The matter, however, is placed beyond all doubt when we find that the plaintiff claims cesses only upon the amount stated to be rent, and not upon the amount claimed as price of husk. If the latter amount had borne the character of rent, the plaintiff would have been entitled to claim cesses thereon, and what is more, he would have been liable to pay to the State cesses on the basis of the rent thus realised. In our opinion, the terms of the contract, as also the interpretation put thereon by the plaintiff himself, leave no room for serious controversy that the sum claimed as the value of the husk

does not form part of the consolidated rent, but is an independent item falling within the description of an imposition in addition to the actual rent, though it may not have been specifically described in the contract, or claimed in the plaint under the denomination of *ahwab*, as was done in some of the cases in the books. *Tilukhdari Singh v. Chulhan Mahton* (1), *Radha Prasad Singh v. Bal Kowar Koeri* (2). The view we take is amply supported by the decision in *Sreekanta Prasad v. Irshad Ali Sircar* (3), which has many features in common with the case now before us.

1912  
MATHURA  
PRASAD  
v.  
TOTA SINGH.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs. The cross objection filed on behalf of the respondent is not pressed, and is, consequently, dismissed without costs.

O. M.

*Appeal dismissed*

- (1) (1889) I. L. R. 17 Calc. 131.      (2) (1890) I. L. R. 17 Calc. 726.  
(3) (1894) 16 C. L. J. 225.

## ORIGINAL CIVIL.

*Before Imam J.*

JAGARNATH &amp; Co.

v.

CRESSWELL AND OTHERS.\*

1913

April 7

*Trade-mark—Licensor and Licensee—Estoppel—Evidence Act (1 of 1872) s. 117—Licensee's right to question Licensor's title—Public Policy—Assignment of trade-mark denoting merely standard or quality of manufacture—Abandonment of trade-mark—Incoming Partner, liability of, for obligations of firm—Costs.*

The licensee of a trade mark is estopped, as against his licensor, from questioning the latter's title to the trade-mark.

The fact that the licensee has repudiated his contract with his licensor cannot give him the right to question the licensor's title, for the latter's concurrence is necessary to rescind the contract.

*Johnstone v. Milling* (1) referred to.

Where jute trade-marks, bearing the name of the original proprietor of those marks, have come, by usage of trade, to indicate, not the skill in selecting jute of the original proprietor so as to make those marks personal to him, but merely a certain standard, kind, quality, or mode of manufacture of goods, irrespective of the person in whose hands the business might be, the assignment of such marks is not a fraud on the public or against public policy.

A license for four out of seven trade-marks, the remaining three having been abandoned, is valid.

*British American Tobacco Co., Ltd. v. Mahboob Buksh* (2) distinguished.

As the right to a trade mark might be acquired so it might be abandoned, and no length of time is required for acquiring the right, or, apart from statutory law, to constitute an abandonment.

*Laverne v. Hooper* (3) approved.

\* Original Civil Suit No. 932 of 1912.

(1) (1886) 16 Q. B. D. 460.

(2) (1910) I. L. R. 38 Cal. 110.

(3) (1882) L. J. R. 2 M. 140.

An agreement by an incoming partner to make himself liable to creditors of the firm before he joined it, may be established by indirect evidence, and the Courts lean in favour of such an agreement and are ready to infer it from slight circumstances.

*Ex parte Jackson* (1), *Ex parte Peele* (2), and *Rolfe and the Bank of Australia v. Flower, Salting & Co.* (3) approved.

1913  
JAGARNATH  
& Co.  
v.  
CRESSWELL  
AND OTHERS.

ONE S. C. Chatterjee, who carried on business as a baler of pucca bales of jute, was the original owner of seven trade-marks under which he packed pucca bales of jute. After his death the said seven marks, together with the good-will of his business, were, on the 24th September, 1904, assigned to a firm of Landale and Morgan, who on the 26th September, 1904, assigned the same to one Harsook Dass Dooli Chand, who on the 8th May, 1907, assigned the same to one Gokhul Chand Khettau, who, on the 3rd April, 1908, assigned the same to the plaintiff firm, who on the 24th September, 1910, gave a license for four out of the said seven marks to a firm of jute brokers named Moran & Co., for the jute season ending 30th June, 1911, and by an agreement dated 8th July, 1911, gave a further license for the same four marks to Moran & Co. for three more jute seasons, ending 30th June, 1914, Moran & Co. agreeing to pay certain royalties thereunder. It was found with regard to the remaining three marks that they had fallen into disuse and had been abandoned. The firm of Moran & Co. at that time consisted of the defendants Cresswell and Smyth, the defendant Watson having subsequently entered as a partner. The agreement of the 8th July, 1911, by which the second license was granted to Moran & Co. purported to grant a license to use and employ the said four marks for three years, and to hold for the the said period the good-will of the business of

(1) (1790) 1 Ves. Jun. 131.

(2) (1802) 6 Ves, Jun. 602.

(3) (1865) L. R. 1 P. C. 27.

1913  
JAGANNATH  
& Co.  
v.  
GRESWELL  
AND OTHERS.

S. C. Chatterjee, the original baler, so far as the said marks were concerned. At the time of this agreement the London jute trade had established certain "groups" of marks, and in each group had included certain selected marks of a given and similar standard of quality. Dealers were thus able to buy and sell any of the marks within a particular group, and the form of contract which prevailed when group marks were dealt in, enabled the seller to deliver in fulfilment of his contract any other mark belonging to the same group as a substitute. Trade in these marks was thus facilitated, and the marks included in these groups had therefore a special value. The groups which had thus been established by the jute trade were at first merely recognised by the London Jute Association, and subsequently this Association, in May, 1912, finally established its own groups of marks, but the groups established by the jute trade still continued to exist. The four marks, which were covered by the second license to Moran & Co. were at the date of the agreement included in certain of the groups established by the jute trade. By clause 4 of the agreement, Moran & Co., undertook that the quality of jute packed under these marks should at no time be inferior to the quality packed under any other mark belonging to the same group as that in which the plaintiff firm's particular mark was included, and which was recognised by the London Jute Association, and undertook to indemnify the plaintiff firm against all loss or damage which it might sustain by reason of the standard being lowered below the standard of the group in which the particular mark stood, or by reason of any breach by Moran & Co., or its nominees, of any of the terms of the agreement. Clause 7 of the agreement provided that if any of the marks should be removed from the group recognised by the

London Jute Association in which the same stood owing to the said marks having been used upon jute of inferior quality, or owing to the breach by Moran & Co. or its nominees or assigns of any of the terms of the agreement or non-compliance with any of the requirements of the Calcutta or London Jute Associations as regards the quality of jute to be packed under the four marks, Moran & Co. should indemnify the plaintiff firm against all damage or loss it might sustain by reason of such removal. Clauses 4 and 7 are fully set out in the judgment.

By an agreement dated 1st March, 1912, Moran & Co., with the concurrence of the plaintiff firm, assigned to a firm of Hawarth & Co., consisting of the defendants Hannah and Smallwood, all its rights under its agreement with the plaintiff firm, but so as not to release Moran & Co. from liability in the event of Hawarth & Co. committing any breach of its agreement, and Hawarth & Co. agreed to pay the royalties and to perform and observe all the covenants and stipulations contained in the agreement between the plaintiff firm and Moran & Co.

In May, 1912, the London Jute Association finally established six groups of marks of its own, known as "association groups" and none of the plaintiff firm's marks were included in any of them. On this, Moran & Co. and Hawarth & Co. declined to carry out their agreements with the plaintiff firm, or to pay any further royalty thereunder. The plaintiff firm thereupon brought this suit, alleging that Moran & Co. and Hawarth & Co., or either of them, had permitted jute of inferior quality to be packed under the aforesaid marks, or otherwise committed breaches of the rules and regulations of the London Jute Association, by reason whereof the marks had been excluded from their respective groups and had become valueless, and

1913

JAGANNATH  
& Co.  
v.  
CRESSWELL  
AND OTHERS.



1913  
JAGANNATH  
& Co.  
v.  
CRESSWELL  
AND OTHERS.

the plaintiff firm had thereby sustained damage which it assessed at Rs. 3,50,000. The plaintiff firm sought to recover this sum as damages, and to recover the royalties payable under the aforesaid agreements.

The defendants pleaded that the marks were still in the groups in which they stood, which groups were quite distinct from the groups finally adopted by the London Jute Association; that the groups mentioned in their agreements had no reference to the Association groups, for the exclusion from which they were in no way responsible; that they had not committed any breaches of their agreements; that the plaintiff firm had not sustained any damage through any act or default of the defendants; that the plaintiff firm was not the legal proprietor of the marks; and that the agreements with the plaintiff firm were illegal and void as being contrary to public policy.

The defendant Watson further pleaded that inasmuch as he had become a partner in Moran & Co. subsequent to its agreement with the plaintiff firm, he could not in any event be held liable for its breach, if any.

*Mr. H. D. Bose* (with him *Mr. B. C. Mitter*, *Mr. A. N. Chaudhuri* and *Mr. P. R. Das*), for the plaintiff firm. The defendants cannot be permitted to question our title to the marks, they being our licensees: s. 117 Evidence Act. They are estopped from questioning the title so long as the license has not been terminated by mutual consent.

*Mr. W. Garth* (with him *Mr. Buckland* and *Mr. Langford Jane*), for the defendants Cresswell and Smyth. The defendants having repudiated their license can now question the title of the plaintiff firm. In this respect s. 117 of the Evidence Act is the same as s. 116, that is to say the estoppel only operates during the continuance of the license.

There being an assignment of only four out of the seven marks, and of the good-will of only these four marks, the assignment was bad in law: *British American Tobacco Co., Ltd. v. Mahboob Buksh* (1).

1913  
JAGARNATH  
& Co.  
v.  
CRESSWELL  
AND OTHERS

The marks in suit were not trade-marks in the proper sense of that expression, but were merely what are known as "quality" marks. They could therefore not be infringed, and no action could lie in respect of them: *Vadilal v. Burditt & Co.* (2).

The marks in suit bore the original proprietor's name, and indicated the skill in selecting and assorting the jute packed under such marks by the original proprietor. The marks therefore became personal to him, and inasmuch as by the assignment the consumer was likely to be deceived, the assignment was void as being a fraud upon the public and against public policy: *Rey v. Lecouturier* (3).

*Mr. W. Gregory* (with him *Mr. L. P. Pugh*), for the defendants Cresswell and Smyth, supported *Mr. Garth*.

*Mr. Avetoom* (with him *Mr. H. G. Pearson* and *Mr. R. C. Bonnerjee*), for the defendant Watson, submitted that his client could not in any event be held liable inasmuch as he joined the firm of Moran & Co. subsequent to both their agreement with the plaintiff firm and to the assignment to Hawarth & Co.

*Mr. B. C. Mitter*, in reply. There is a difference in the wordings of ss. 116 and 117 of the Evidence Act, and one section cannot be judged by the other. Section 117 places no limit on the period of estoppel as s. 116 does. But even if it does, the license here cannot be said to have been rescinded, inasmuch as the plaintiff firm has not been a party to the rescission: *Johnstone v. Milling* (4).

(1) (1910) I. L. R. 38 Calc. 110.

(3) (1907) 25 Pat. Rep. 265 ;

(2) (1905) I. L. R. 30 Bom. 61.

(1910) 27 Pat. Rep. 268.

(4) (1886) 16 Q. B. D. 460.

1913

JAGARNATH  
& Co.

v.

CRESSWELL  
AND OTHERS.

The evidence shows that there was an abandonment of the three marks not assigned, and there was therefore not a partial assignment, and the assignment of the four marks and the good will relating thereto was an assignment of the whole business of the plaintiff firm. In this respect the present case is distinguishable from the *British American Tobacco Co., Ltd. v. Mahboob Buksh* (1).

The case of *Vadital v. Burditt & Co.* (2) has no application, because here the evidence shows that the marks were not merely "quality" marks, but genuine trade-marks.

The marks in suit being jute trade-marks, indicated, according to the evidence, merely a certain standard, kind, or quality of jute packed under those marks by persons who succeeded to the business of the original proprietor. There was nothing personal about them. The assignment was therefore not a fraud on the consuming public or against public policy and the present case was different to *Rey v. Lecouturier* (3).

The defendant Watson is equally liable with his other partners, for he joined the firm of Moran & Co. with full knowledge of its liability to the plaintiff firm and of both the agreements, and his partnership deed clearly shows that his liability was contemplated. Moreover, the agreement between the plaintiff firm and Moran & Co. clearly mentions all the present and future members of that firm as those on whom it would be binding, and Watson joined the firm with knowledge of this agreement. It is submitted that the Courts lean in favour of agreements by incoming partners to be liable for obligations of the firm, and are ready to infer such agreements from slight

(1) (1910) I. L. R. 38 Cal. 110.

(3) (1907) 25 Pat. Rep. 265 ;

(2) (1905) I. L. R. 30 Bom. 61.

(1910) 27 Pat. Rep. 268.

circumstances: *Ex parte Jackson* (1), *Ex parte Peele* (2), and *Rolfe and the Bank of Australia v. Flower, Salting & Co.* (3).

1913  
JAGARNATH  
& Co.  
v.  
CRESSWELL  
AND OTHERS.

IMAM J. This suit was brought by a Marwari firm of jute balers of the name of Jagarnath & Co. against the several members of two other firms of jute balers, viz., Moran & Co. and Hawarth & Co., asking for damages from the defendants on account of breaches of their covenants in respect of certain jute trade-marks of which the plaintiff firm are the owners, and Moran & Co. and Hawarth & Co. are the licensees and sub-licensees respectively, and for payment of royalty in respect of the trade-marks for the season 1912-13.

The defendants Cresswell, Smyth and Watson are members of the firm of Moran & Co., while the defendants Hannah and Smallwood are members of the firm of Hawarth & Co.

The plaintiff firm purchased seven trade-marks, of which four are in suit, from one Gokhul Chand Khettan, on 3rd April, 1908. The marks originally belonged to one S. C. Chatterjee, who carried on a jute-baling business. On his death the marks were assigned by his widow, as executrix of his will, and his heirs, as beneficiaries under the will, on 24th September, 1904, to Messrs. Landale and Morgan, with the good-will of the business for a sum of Rs. 75,000. The latter thereafter, on 26th September, 1904; assigned the trade-marks with the good-will of the business to Harsook Das Dooli Chand for a sum of Rs. 85,000. On 8th May, 1907, Dooli Chand transferred the trade marks with the good-will of the business to Gokhul Chand Khettan, for a consideration

(1) (1790) 1 Ves. Jun. 131.

(2) (1802) 6 Ves. Jun. 602.

(3) (1865) L. R., 1 P. C. 27.

1913  
 JAGARNATH  
 & Co.  
 v.  
 CRESSWELL  
 AND OTHERS.  
 IMAM J.

of Rs. 3,50,000, and he in his turn assigned the trade-marks with the good-will of the business to the plaintiff firm in lieu of Rs. 1,90,000, on 3rd April, 1908.

On 24th September, 1910, Jagarnath & Co. gave a license in respect of four out of the seven trade-marks to Moran & Co. to use and employ the said marks for a period of one jute season, that is, up to 30th June 1911. On the expiration of that period a second license was obtained by Moran & Co. from Jagarnath & Co., by a deed of agreement dated 8th July, 1911, for a period of three jute seasons extending up to 30th June, 1914. The annual royalty for the use of the marks was fixed at Rs. 23,500, in instalments of Rs. 10,000, Rs. 5,000, Rs. 5,000 and Rs. 3,500, payable on dates mentioned in the deed. The agreement purports to grant a license to Moran & Co. to use and employ the said four marks for a period of three years and to hold for the said period the good-will of the business of S. C. Chatterjee, the original baler of the marks, as far as the said marks are concerned. The claim for damages in this suit is based on the stipulation contained in clauses 4 and 7 of the deed. I quote the clauses hereunder:

"*Clause 4.* The licensees do hereby undertake that the quality of jute packed under the trade-marks set forth hereunder in the schedule, respectively, shall at no time be inferior to the quality of the jute packed under any corresponding trade-mark which is included in the group of trade-marks which is recognised by the London Jute Association, and in which group that mark is, and of which groups the 3 S mark stands in the group which is known in the jute trade as the "six marks group" of first marks, and shall at all times indemnify and keep indemnified the proprietors to the fullest extent from and against all losses, costs and damages and expenses which the

proprietors may incur, suffer, sustain or be put to, by reason of or on account of the standard of the trade marks hereby licensed to the licensees having been lowered below the standard of any of the corresponding marks of the group in which the mark is, or by reason of any breach on the part of the licensees or any persons working under them or any of their nominees, of any of the terms and conditions of these presents."

"*Clause 7.* If at any time any of the marks set forth in the schedule hereunder shall be removed from the group of trade-marks recognised by the London Jute Association, in which the same now is, owing to the said marks having been used upon jute of inferior quality, or owing to the breach by the licensees or their nominees or assigns of any of the terms and conditions of the agreement or of any of the rules and regulations of the Calcutta or London Jute Association, or non-compliance with any of the requirements of the said Associations as regards the quality of jute to be packed under the said marks hereby leased or otherwise, then the licensees shall indemnify the proprietors by payment of all damages, costs, losses and expenses which they may suffer or incur by reason of the said marks having been removed from the group of marks in which the said trade-mark now is."

By an indenture dated the 1st March, 1912, Morau & Co., with the concurrence of Jagarnath & Co., transferred to Hawarth & Co. their rights in respect of the marks under their license, Hawarth & Co. agreeing on their part to pay the royalty and to perform and observe the covenants and stipulations contained in the license.

In 1911, some time prior to the 1st of July, the London Jute Association had issued a circular declaring

1913  
 JAGARNATH  
 & Co.  
 v.  
 CRESSWELL  
 AND OTHERS.  
 IMAM J.

1913  
JAGARNATH  
& Co.  
v.  
CRESSWELL  
AND OTHERS.  
IMAM J.

their decision to adopt "Association groups" with the object of encouraging the better and more regular baling of jute, in which were to be included those marks baled by Indians of which the quality had been as nearly as possible in accordance with the guarantee of the contract. By this circular the London Jute Association adopted or proposed to adopt seven groups of marks, viz.: Reds, Firsts, Daccas, Lightnings, Mangos, Hearts and Daisee. Of the 4 marks in suit, 4 S in a red circle, 3 S in a black circle, 3 S in a red circle, and 3 S in a heart were placed in the groups Reds, Firsts, Mangos and Hearts, respectively.

In 1912, by their circular dated 8th May, 1912, the London Jute Association finally decided on their "Association groups" and retained only 6 instead of 7 groups, striking out the group Reds altogether, and in none of these 6 groups was any of the marks in suit included.

On the 29th June, 1912, Hawarth & Co., by their letter of that date gave notice to Jagarnath & Co. that in the events that had happened they would not carry out the contract signed by them. On 2nd July, 1912, Messrs. Leslie & Hinds, attorneys on behalf of Hawarth & Co. and Moran & Co., informed Jagarnath & Co. that neither of the two firms was bound by the agreement and that they declined to carry out the same.

The plaintiff firm maintain that Moran & Co. and Howarth & Co., or either of them, permitted jute of inferior quality to be packed under the marks or otherwise committed breaches of the Rules and Regulations of the London Jute Association, wherefore the said marks have been removed from their respective groups, and that by reason of such exclusion the marks have become practically valueless and the plaintiff firm have suffered heavy damages which

they assess at Rs. 3,50,000. The plaintiff firm further claim that the defendants were bound by their agreements to pay to the plaintiff the royalty by the instalments mentioned in their deeds which they have not done.

1913  
JAGARNATH  
& Co.  
v.  
CRESSWELL  
AND OTHERS.

The defendants Cresswell and Smyth aver that the marks in question are yet in the groups in which they were; that the groups mentioned in the deed of agreement have no reference to the groups adopted by the London Jute Association; that they are not in any manner responsible for the exclusion of the marks from the London Jute Association groups; that it is not true that the marks have become practically valueless; that they have not been guilty of any breaches of the agreement, nor have the plaintiff firm sustained any damages by reason of any act or default of the defendants; that the plaintiff firm are not the legal proprietors of the marks; and that the agreement dated 8th July, 1911, is illegal, invalid and void as being contrary to public policy.

IMAM J.

The defendant Watson pleads that he is not liable to the plaintiff firm as he became a partner in the firm of Moran & Co. on 1st April, 1912, which was a long time after the agreement of 8th July, 1911; that there was no agreement between him and the plaintiff firm in respect of the marks; and that the agreement dated 8th July, 1911, is illegal, invalid and void as being contrary to public policy.

The defence of the defendants Hannah and Smallwood is substantially the same as that of the first two defendants.

The first question that I have to consider is whether the defendants can be allowed to deny the plaintiff's title. The contract between the owner of a trade-mark and his licensee is like a contract between a landlord and his tenant, and as between



1913  
 JAGARNATH  
 & Co.  
 v.  
 CRESSWELL  
 AND OTHERS.  
 IMAM J.

landlord and tenant so between licensor and licensee the former's right cannot be questioned by the latter.

In *Clarke v. Adie* (1) which was a case of a patent, Lord Blackburn said: "Although a stranger might shew that the patent is as bad as any one could wish it, the licensee must not shew that," and in the same case Lord Cairns observed: "So far as he is concerned he must stand here admitting the novelty of the invention, admitting its utility and admitting the sufficiency of the specification." In an earlier case, *Grover and Baker Sewing Machine Co. v. Millard* (2), Wood V. C. held that the fact of a patent having been found invalid at law in an action between the patentee and a third party, could not be set up against the patentee by his licensee in a suit upon the same patent. The licensee of a trade-mark is in the same position as the licensee of a patent. But it has been urged on behalf of the defendants that they having repudiated the contract the relation of licensor and licensee no longer subsists between the plaintiff and them. This proposition fails to take notice of the other party to the contract, whose concurrence to terminate the contract is as essential as that of these defendants. Here may be aptly quoted the words of Lord Esher, M. R., in *Johnstone v. Milling* (3): "When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract

(1) (1877) L. R. 2 A. C. 423.

(2) (1862) 8 Jur. (N. S.) 713.

(3) (1886) 16 Q. B. D. 460, 467.

being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission." In the present case the plaintiff firm are holding to the contract and therefore the parties must be treated as governed by a subsisting contract. So long as the plaintiff firm are excluded from claiming for infringement of their trade-marks against the defendants by reason of the license, their right cannot be brought under discussion at the instance of those that have the permission to use the trade-marks. The defendants as licensees and sub-licensees are precluded from questioning the plaintiffs' right.

The next question to which I am asked to direct my attention is the validity of the agreements dated 8th July, 1911, and 1st March, 1912. The defendants object to these agreements on three grounds. *First*, that the marks in suit were originally the property of S. C. Chatterjee, whose skill in selecting jute secured for his goods a reputation that was associated with his name, and therefore his trade-marks, being personal, could not be assigned; *secondly*, that the license in respect of the trade-marks in question does not carry with it the good-will of the business of S. C. Chatterjee; and, *thirdly*, that the license, covering as it does only 4 out of 7 trade marks, must be invalid as there is no divisibility in trade-marks.

For the first objection, before it is ruled in the defendants' favour, the consideration arises if the trade-marks are so completely personal to S. C. Chatterjee as of necessity to import that the goods packed under them have been manufactured by him. In *Honie v. Chavey* (1) the Supreme Court of Massachusetts expressed the principle involved here in the following terms:—"There may, no doubt, be cases

1913  


---

JAGARNATH  
& Co.  
v.  
CRESSWELL  
AND OTHERS.  


---

IMAM J.

1913  
 JAGARNATH  
 & Co.  
 v.  
 CRESSWELL  
 AND OTHERS.  
 IMAM J.

where the personal skill of an artist or artisan may so far enter into the value of a product that a trade-mark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and in such cases it would be a fraud upon the public if the trade-mark should be used by other persons, and for this reason such a trade-mark would be held to be unassignable . . . . But, on the other hand, the usages of trade may be such that no such inference would naturally be drawn from the use of a trade-mark which contains a person's name, and that all that purchasers would reasonably understand is that goods bearing the trade-mark are of a certain standard kind or quality, or are made in a certain manner or after a certain formula, by persons who are carrying on the same business that formerly was carried on by the person whose name is in the trade-mark." There is a long series of English decisions to the effect that the mere name of the maker will be deemed to be indicative rather of a business, in whose-soever hands it may be, than of an individual proprietor of it, and indeed the evidence on either side in this case is unambiguous that these trade-marks are merely indicative of a certain standard of quality associated with the good-will of the business of S. C. Chatterjee. For the defence, reliance is placed on the provision of law that an agreement that is opposed to public policy is void. But "public policy", it has been said, "is always an unsafe and treacherous ground for legal decision", per Lord Davey in *Janson v. Driefontein Consolidated Mines, Ltd.* (1), and Sir George Jessel remarked in *Printing and Numerical Registering Company v. Sampson* (2) "it must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being

against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.” It is for the defendants to show that the agreements are opposed to public policy, and this they have failed to do.

1913  
JAGARNATH  
& Co.  
v.  
GRESSWELL  
AND OTHERS.  
IMAM J.

The second objection is not borne out by the deed of agreement dated 8th July, 1911, as it covers the trade-marks and the good-will alike. The 9th clause of the deed runs thus:—

“*Clause 9.* The licensees having paid the said royalty hereby reserved, and otherwise complying with and conforming to all the terms and conditions of this agreement, shall and may at all times during the said term peacefully and quietly use or employ or permit others to use or employ exclusively the said trade-marks, and to hold the good-will of the business of Surjoo Chandra Chatterjee, the original baler of the said marks, as far as any of the said marks are concerned, without lawful interruption or interference by the proprietors.”

The third objection is also not tenable, in my opinion. The original baler, it is true, owned seven trade-marks in connection with his business, but it appears that the three marks that have not been the subject of the license have not been in use since the first assignment in 1904. Mr. Douetil, a witness for the defendants, has stated that the 4 marks in suit, known as the range of S marks, were being packed during the last 8 or 10 years, while the

1913  
 JAGARNATH  
 & Co.  
 v.  
 GRESSWELL  
 AND OTHERS.  
 IMAM J.

other marks were never offered in such quantities as to make them noticeable ; and Ramjidas, a member of the firm of Jagarnath & Co., has in his deposition stated that from the date of the first assignment, 24th September, 1904, to the date of the first license to Moran & Co., 24th September, 1910, no jute was packed under the other three marks. No evidence has been tendered on behalf of the defence to shew that the three marks in question had not fallen into disuse. In the absence of such evidence, abandonment of the marks has to be held on the statements of Mr. Douetil and Ramjidas. In *Lavergne v. Hooper* (1), the learned Judges (Turner C. J. and Muttusami Ayyar J.) pointed out that as the right to a trade-mark might be acquired so it might be abandoned, and that as no length of time was required for the acquiring of a right to a trade mark, in like manner, apart from statutory law, no length of time was required to constitute an abandonment. In the present case all the circumstances point to the three marks having fallen into disuse. and I cannot hold that the four trade-marks in suit could not be dealt with without the other three marks.

Apart from the view I have taken of the second and third objections, I do not think they can be raised by a licensee against his licensor, because the consideration for the promise to pay the stipulated royalty is the permission to use the trade-marks, and so long as the two agreements afford an excuse for an infringement it is not open to the licensee to avoid his liability by such objections. Considerable stress has been laid on the authority of the case of *British American Tobacco Co., Ltd. v. Mahboob Buksh* (2), but the principles explained there have no

application to the considerations that govern this case.

On behalf of the defendants Hannah and Smallwood, it was urged at the time the issues were framed that the plaintiff firm first verbally and then by recital in the agreement untruly represented in a manner not warranted by their information that they were the owners of the trade-marks, and thus by misrepresentation induced the agreement dated 1st March, 1912. No evidence of any misrepresentation has been adduced, and there is nothing in the deed itself that can be pointed out as untruthful. In this connection it has been argued by the defence that the assignments by Landale and Morgan to Harsook Das Dooli Chand and by the latter to Gokhul Chand Khetttau were not valid, as when Landale and Morgan had the good-will and the marks assigned to them they were carrying on a jute-baling business of their own, and in their business the business and trade-marks of Surjoo Chandra Chatterjee got so completely merged that they lost their identity, and thus the assignment of the 7 marks with Chatterjee's good-will, not being an assignment of the whole business of Landale and Morgan, was invalid. Similar argument has been pressed in respect of the assignment by Harsook Das Dooli Chand to Gokhul Chand Khetttau. There is no authority for such a proposition nor does it appeal to me as sound. The evidence shows that Landale and Morgan and Harsook Das Dooli Chand, on their respective assignments, treated the good-will with the trade-marks of S. C. Chatterjee as their property separate from their existing business. The several transactions of mortgage and reconveyance between them bear out this view.

For the reasons I have stated above, I hold that the agreements dated 8th July, 1911, and 1st March, 1912,

1913

JAGARNATH  
& Co.

v.

CRESSWELL  
AND OTHERS.

IMAM J.

1913  
JAGARNATH  
& Co.  
v.  
CRESSWELL  
AND OTHERS.  
IMAM J.

are legal, valid and operative. I now come to the plaintiffs' claim for damages. It is admitted on behalf of the defendants that the marks, though included in the "Association groups," proposed or adopted, in 1911, find no place in the "Association groups" in 1912, but they say that their license has no reference to "Association groups" but to certain trade groups recognised but not established by the London Jute Association. A reading of clauses 4 and 7 of the deed of agreement dated 8th July, 1911, bears out the defendants' contention. The trade had established certain groups of marks for their own facility and the London Jute Association merely recognised those groups, and it was not till 1911 that the Association decided to adopt groups of their own. The Association for their groups adopted the names given by the trade, but made certain alterations in their constitution. The marks in suit were in certain groups established by the trade, the mark 3 S. in a black circle being in Firsts that was commonly known as "six marks group" consisting of six marks only. The trade then extended the 6 marks into 8 marks and thereafter there existed the 6 marks group and 8 marks group contemporaneously. When the Association inaugurated or proposed their own groups in 1911, they included 10 marks in the group known as Firsts. Thus they never had any group consisting of 6 marks in the Firsts. The 4th clause of the deed clearly refers to "six marks group" and it will be a stretch of meaning to construe it as referring to the Association's Firsts. The same clauses 4 and 7 are found in the first license, the deed of agreement dated 24th September, 1910, and no one can say that in that deed "Association groups" were meant, as in 1910 the Association had introduced no groups of

on behalf of the plaintiff not to construe the second license by reference to the first, but when the language employed in the two licenses is identically the same, the first license has a considerable bearing on the second. For the plaintiff attempt has been made to establish that since the inauguration of "Association groups", the 6 marks group has ceased to be. In this however they have completely failed, as the evidence of Mr. Douetil and Mr. McLeod, who is the Chairman of the London Jute Association, leaves no room for doubt that the trade yet deals in 6 marks group, which exists side by side with Association groups. No evidence has been adduced by the plaintiff to show that the marks in suit have been removed from the trade groups in which they were. My view, therefore, is that the indemnity in the agreement does not relate to group or groups of marks established by the London Jute Association, and that the claim for damages is not sustainable. I may here mention that in no case could a claim for damages lie against the defendants Hannah and Smallwood, as nothing has been pointed against them that could lead me to hold that they are in any wise responsible for the removal of the marks even from the Association groups.

The defendant Watson pleads that he is not liable to the plaintiff, as he became a partner in the firm of Moran & Co. after the agreement, and there was no contract between him and the plaintiff. It is no doubt a rule of law that a person admitted as a partner into an existing firm does not by his entry become liable to the creditors of the firm for anything done before he became a partner, but an agreement by an incoming partner to make himself liable to creditors of the firm before he joined it may be established by indirect evidence. The Courts, it has been said, lean in favour of such an agreement and are ready to infer it from

1913  


---

JAGARNATH  
& Co.  
v.  
CRESSWELL  
AND OTHERS.  


---

IMAM J.



1913  
 JAGARNATH  
 & Co.  
 v.  
 CRESSWELL  
 AND OTHERS.  
 IMAM J.

slight circumstances: see *Ex parte Jackson* (1), *Ex parte Peele* (2) and *Rolfe and the Bank of Australia v. Flower, Salting & Co.* (3). The evidence in this case, however, appears to me not slight but cogent to fix the liability on all the members of the present firm of Moran & Co. The defendant Watson entered into partnership with Cresswell and Smyth in the firm with the knowledge of the liability to Jagarnath & Co. in respect of the jute marks, and in the deed of partnership dated 18th October, 1911, by which he became a partner, the language employed in clause 12 of that deed leaves no doubt in my mind that he is equally liable to the plaintiff firm, though he may be entitled to be indemnified by Cresswell for any demands that he may have to satisfy in respect of these marks. The deed of agreement dated 8th July, 1911, by which Messrs Moran & Co. were licensed to use the trade-marks, clearly mentions all the present and future members of that firm on whom the agreement would be binding, and it was with this knowledge that Watson entered into partnership of that firm. The defence set up by him was undoubtedly not in his mind when a letter dated 15th August, 1912, was addressed by Messrs. Moran & Co. to the plaintiff firm. That letter contains the following significant passage:

“ We also give you notice that we are advised, as you have already been informed by our solicitors, Messrs. Leslie and Hinds, that we are in no way liable to you under either of the agreements relating to the 3 S mark, and in fact under section 65 of the Indian Contract Act you are bound to repay us the amounts you have obtained from us in terms of the agreements which, we are now advised, are void.”

(1) (1790) 1 Ves. Jun. 131.

(2) (1802) 6 Ves. Jun. 602, 604.

(3) (1865) L. R. 1. P. C. 27.

In connection with the above passage it has to be remembered that at the date of the above letter Mr. Watson was a member of the new firm of Moran & Co., and he in conjunction with his partners was laying claim by this letter to a refund under section 65 of the Contract Act. If he had entered the firm without the liability to the plaintiff firm I fail to see how the firm of Moran & Co., consisting of himself and Messrs. Cresswell and Smyth, could claim such a refund unless he had entered into the partnership burdened with liabilities of the old firm. This is also borne out by clause 5 of the deed of partnership whereby all office furniture, books, fittings and moveable property belonging to the former firm of Moran & Co. become the property of all the three partners. I hold that Mr. Watson is equally liable to Jagarnath & Co.

My conclusion, therefore, is that the plaintiff firm are entitled to their royalty from all the five defendants, as claimed in the plaint, and the suit is decreed to that extent, while the claim to damages cannot be allowed and the suit to that extent is dismissed.

As regards costs, general costs of suit are allowed to the plaintiff. The defendants are entitled to such costs of hearing as are occasioned by reason of joinder of claim for damages. They are further entitled to one day's costs for the adjournment occasioned by the failure of the plaintiff to disclose certain documents, in their affidavit of documents. The rest of the costs of the hearing the plaintiff firm are entitled to. I am asked by the learned counsel for the parties to apportion the costs of hearing, as a reference to the Taxing Master will entail hearing expenses on them. All costs before the actual hearing are to be borne by the defendants. From the day the case was opened to the day when the argument of the plaintiff was concluded

1913  
JAGARNATH  
& Co.  
v.  
CRESSWELL  
AND OTHERS.  
IMAM J.

1913  
JAGANNATH  
& Co.  
 v.  
 CRESSWELL  
 AND OTHERS.  
IMAM J.

there were 19 days of hearing. Of these, on an examination of the record, I assess four days to have been spent on account of the joinder of the claim for damages, and the costs of hearing of these days the plaintiff must pay to the defendants, while the latter must pay to the former the costs of 14 days of the hearing, the costs of one further day occasioned by the adjournment being payable to the defendants from the plaintiff. There will be the usual set-off between the parties. The defendants will get only one set of costs between them. The costs will be on scale No. 2.

Attorney for the plaintiffs: *S. C. Mukerjee.*

Attorneys for the defendants: *Leslie & Hinds,*  
*and Sutcliffe.*

C. B.

---

## ORIGINAL CIVIL.

---

*Before Fletcher, J.*

1913  
April 8.

PROSAD CHUNDER DE

v.

CORPORATION OF CALCUTTA.\*

*Municipal Corporation—Chairman—General Committee—Building-plans, refusal of sanction of—Calcutta Municipal Act (Beng. III of 1899), ss. 375, 377—Action for mandamus or damages whether maintainable—Specific Relief Act (I of 1877), s. 45.*

Where plans for building have been rejected by the Chairman and the General Committee of the Calcutta Municipal Corporation, no suit is maintainable to have the plans approved or for damages. If the Chairman and General Committee have acted honestly and within their authority, their

\* Original Civil Suit No. 205 of 1912.

decision cannot be reviewed by any Court. If the plans have been rejected *malà fide* the only remedy is by an application under s. 45 of the Specific Relief Act, or an order to compel the Chairman and the General Committee to hear the matter in the manner provided by law.

*Davis v. Bromley Corporation* (1) and *Smith v. Chorley Rural Council* (2) followed.

*London and North Western Railway v. Westminster Corporation* (3) referred to.

1913  
PROSAD  
CHUNDER DE  
v.  
CORPORATION  
OF  
CALCUTTA.

#### ORIGINAL SUIT.

This suit was instituted by Prosad Chunder De and his brother against the Corporation of Calcutta, the Chairman and the General Committee of the Corporation, the substantial relief prayed for being damages for the alleged wrongful refusal of sanction of a certain building scheme

The plaintiffs were the owners of a parcel of vacant land known in 1910 as No. 25-1, Jannagore Road, now known as No. 1, Linton Street, situate in the 24-Parganas, but within the municipal limits of Calcutta. With a view to erecting a building on this land the plaintiffs applied to the Corporation of Calcutta on the 14th September, 1910, for a plan of the road alignment in that quarter and were duly supplied, on the 22nd October 1910, with a plan of the alignment, which had been prescribed under section 350 of the Calcutta Municipal Act.

The plaintiffs prepared plans, keeping their proposed building clear of this road alignment, and on the 7th December, 1910, duly submitted their plans in triplicate to the Corporation for approval of the site and sanction to erect their building.

On the 9th January, 1911, two of the three plans were returned to the plaintiffs with a letter, dated the 6th January, 1911, from the District Building Surveyor

(1) [1908] 1 K. B. 170.

(2) [1897] 1 Q. B. 678.

(3) [1904] 1 Ch. 759.

1913  
PROSAD  
CHUNDER DE  
v.  
CORPORATION  
OF  
CALCUTTA.

of District III, intimating that sanction was refused on the ground that "the proposed building falls on the prescribed road line, section 352," this alleged prescribed road line being marked on the plans by the Building Surveyor.

It appears that at the time of the submission of the plans, a plan was being prepared of a new projected road, which would cut through the site of the proposed new building, and it was in consequence of this that the plaintiffs were refused sanction, although at the time the sanction of the General Committee had not been obtained to the new projected road.

On the 17th January, the plaintiffs re-submitted their plans to the Building Surveyor, drawing to his attention that the road line marked by him on their plans had not been sanctioned by the General Committee.

The fresh alignment was, in fact, not sanctioned by the General Committee until the 20th January.

On the 14th February, the plans were returned to the plaintiffs, sanction being again refused on the same ground, with a note from the Building Surveyor to the effect that the alignment had been sanctioned by the General Committee. On making further enquiries the plaintiffs were informed, on the 4th March, that the fresh alignment had been sanctioned under section 356 of the Municipal Act, and hence it was unnecessary for the General Committee to give any public notice of their intention to align, and, on the 7th April, the plaintiffs were informed by the Building Surveyor that the projected public street was sanctioned by the General Committee on the 20th January.

On the 11th April, the plaintiffs wrote to the Deputy Chairman, pointing out, (i) that the fresh alignment could not be properly made under section 356, which contemplates the opening out of new roads,

but had to be made under section 350, which refers to the widening or improvement of existing roads, and, (ii) that sanction to build had been improperly refused, as on the date of the refusal the fresh alignment had not been sanctioned by the General Committee. The plaintiffs concluded by praying that their appeal may be placed before the Appeals Sub-Committee and decided in their presence.

1913  
PROSAD  
CHUNDER DE  
v.  
CORPORATION  
OF  
CALCUTTA.

On the 8th May, the plaintiffs requested the Chairman to enquire into the matter and to cause their plans to be sanctioned, but the Chairman refused to interfere as the matter was pending before the Appeals Sub-Committee.

On the 29th June, it was decided by the Appeals Sub-Committee that the petition for appeal was time barred under section 621 of the Calcutta Municipal Act.

On the 7th July, the plaintiffs presented a petition to the Chairman and the members of the General Committee, contending that the period of limitation under section 621 should be taken to run as from the 7th April, and praying for an order of remand to the Appeals Sub-committee.

The decision of the Appeals Sub-committee was subsequently confirmed by the General Committee.

After a further infructuous petition to the Chairman and the members of the General Committee, on the 2nd November, 1911, the plaintiffs gave notice of suit under section 634 of the Calcutta Municipal Act.

On the 29th February, 1912, this suit was instituted.

The plaintiffs charged the Chairman and the General Committee with acting in an illegal, harsh and arbitrary manner and with *mala fides* in refusing sanction, and alleged that by reason of such action they had suffered damage which they assessed at Rs. 1,200.

1913  
 PROSAD  
 CHUNDER DE  
 V.  
 CORPORATION  
 OF  
 CALCUTTA.

The reliefs prayed for were, *inter alia*, (i) a declaration that the plaintiffs were and are entitled to have their application of the 7th December, 1910, for approval of site and for permission to build a masonry house thereon sanctioned, and for a decree that the application be sanctioned, (ii) a declaration that the plaintiffs are entitled to build on the premises No. 1, Linton Street, according to their plan, and (iii) the sum of Rs. 1,200 as damages.

On the 30th April, 1912, the plaintiffs were informed by the Deputy Chairman that the General Committee had abandoned the projected public street and the Chairman had ordered sanction to be issued to the plaintiffs' plans, and were requested to resubmit their plans for sanction. The plaintiffs declined to accept this offer without adequate compensation for the damage alleged to have been sustained by them.

A written statement was filed by the Corporation and the Chairman, wherein they alleged that they had "acted lawfully in good faith with due care and attention in the interest of public convenience in refusing sanction to the plan." It was objected that the General Committee, as such, could not be made a party to the suit.

*Mr. C. C. Ghose* (*Mr. A. N. Chaudhuri* with him), for the plaintiffs. This action is properly maintainable. The defendants acted *mala fide*, inasmuch as they acted without jurisdiction and outside the scope of the Calcutta Municipal Act: see *London and North Western Railway v. Westminster Corporation* (1) per Vaughan Williams L. J. at p. 767, citing the definition of "*mala fides*" given by Lord Campbell. When acting without jurisdiction, the question of discretion does not arise. The refusal of sanction under section

377 was clearly *ultra vires* and without jurisdiction: *Robinson v. Local Board of Barton-Eccles* (1). The defendants purported to refuse sanction on the ground that the plans infringed an alleged prescribed road alignment. This alleged alignment was not operative at the time, as it had not received the sanction of the General Committee. Again the alignment could not legally be made under section 356, but ought to have been made under section 350, and public notice ought to have been given under section 350, sub-clause (1).

1913  
PROSAD  
CHUNDER DE  
v.  
CORPORATION  
OF  
CALCUTTA

[FLETCHER J. Your proper remedy was by an application under section 45 of the Specific Relief Act, for a *mandamus*, or you could have gone on building, and if the Corporation called upon you to demolish, you would have had a good defence].

An action of *mandamus* lies: *The Queen v. Lambourn Valley Railway Company* (2). Acting against the provisions of a statute, is acting *mala fide*.

[FLETCHER J. Not when there is a wrongful exercise of discretion. Besides you elected to proceed under section 375. Under section 375, sub-clause (2), the decision of the General Committee is final.]

But that clause does not oust the jurisdiction of the Court; a suit is maintainable: *Chairman of Giridhi Municipality v. Suresh Chandra Mazumdar* (3). The General Committee have been made defendants in the suit for greater safety, in view of the decision in *Bhoaram Choudhury v. Corporation of Calcutta* (4), though the decision in a later case, *Baroda Prosad Roy Choudhry v. Corporation of Calcutta* (5), does not support the earlier authority. In any event, since the General Committee are not appearing, it does

(1) (1883) L. R. 8 A. C. 798.

(3) (1908) 12 C. W. N. 709.

(2) (1888) L. R. 22 Q. B. D. 463.

(4) (1909) I. L. R. 36 Calc. 671.

(5) (1911) 13 C. L. J. 611.



1913  
 PROSAD  
 CHUNDER DE  
 v.  
 CORPORATION  
 OF  
 CALCUTTA.

not lie with the other defendants to take the plea. Section 617 has no application to the present matter, and the High Court is the proper *forum* for this suit.

*Mr. Sircar*, for the defendants, the Corporation and the Chairman. The plaint does not disclose any cause of action, and the suit is not maintainable. *Smith v. Chorley Rural Council* (1), and *Davis v. Bromley Corporation* (2) are conclusive on the point that no action will lie for a *mandamus*, where a municipal body has rejected plans. No specific act of bad faith is charged in the plaint against either the Chairman or the Corporation. The allegation against the General Committee is that the appeal was illegally dismissed: but the plaintiffs had submitted to the jurisdiction by their appeal. The General Committee have been wrongly added as defendants in the name of the "General Committee". From section 5, it is clear the General Committee have no corporate existence.

*Mr. Ghose*, in reply. A suit will lie against a municipal body where the exercise of authority has been capricious, wanton and oppressive: *Nagar Valab Narsi v. The Municipality of Dhanduka* (3).

FLETCHER J. This is a suit brought by Prosad Chunder De, and his brother against the Corporation of Calcutta, the first defendant, and against the Chairman of the Corporation, and also the General Committee of the Corporation. The first relief asked for is as follows: for a declaration that the plaintiffs were and are entitled to have their application of the 7th December, 1910, for approval of site and permission to build a house, sanctioned. The next relief asked for is a declaration that the plaintiffs are entitled to

(1) [1897] 1 Q. B. 678.

(2) [1908] 1 K. B. 170.

(3) (1887) I. L. R. 12 Bom. 490.

build on No. 1, Linton Street according to the plan submitted. The next relief is for Rs. 1,200 as damages alleged to be suffered by the plaintiffs by reason of the sanction being refused. It seems to me quite obvious that a suit of this nature does not lie. The case is covered by the decision in *Davis v. Bromley Corporation* (1). In the course of the argument in that case counsel for the plaintiff argued that the decision in *London and North Western Railway v. Westminster Corporation* (2) was an authority that an action lies against a sanitary authority for breach of duty when it has acted from improper motives, and Bigham J made the remark, "there is no case of such an action as the present and it would obviously be dangerous to allow it, for it would then be open to every one whose plans had been rejected to bring an action". That seems to me to go to the root of the plaintiffs' suit. What is the claim against the Corporation? They allege in their plaint that they are the owners of a piece of land, and on the 7th November, 1910, they lodged with the Chairman of the Corporation certain plans for approval of their proposed masonry building intended to be erected on the property. The approval of the plans was refused by the Chairman, and the plaintiffs then filed an appeal against the decision of the Chairman to the General Committee. That appeal was rejected, it is said, on the ground that the appeal was barred by limitation, but the plaintiffs allege that the decision of the General Committee was illegal, harsh, arbitrary and *mala fide*. It is not stated on what ground, but in paragraph 14 of the plaint they make that general allegation. It seems to me in that case if the decision of the General Committee was illegal, harsh, arbitrary and *mala fide* the plaintiffs have no remedy against

1913  
 PROSAD  
 CHUNDER DE  
 v.  
 CORPORATION  
 OF  
 CALCUTTA.  
 FLETCHER J.

(1) [1908] 1 K. B. 170.

(2). [1904] 1 Ch. 759.

1913  
 ———  
 PROSAD  
 CHUNDER DE  
 v.  
 CORPORATION  
 OF  
 CALCUTTA.  
 ———  
 FLETCHER J.

the defendants by regular suit. The whole of the statutory provisions governing the Corporation of Calcutta are opposed to any such remedy as the plaintiffs seek. From section 370 onwards the Calcutta Municipal Act contains provisions as to the approval of plans for intended buildings by the Chairman of the Corporation, and under section 375 not only is the Chairman made a sort of Court of first instance, but the statute set up a Court of Appeal, that is the General Committee, and these are the local tribunals who have to decide whether the plans did or did not comply with the provisions of the Calcutta Municipal Act.

It is obvious to my mind that so long as the Chairman and the General Committee acted honestly, their decision, provided it was not in excess of their authority under the Act, is not capable of being reviewed by any Court. The whole course of authority is against the decision of such a local tribunal being reviewed by the Civil Courts. The two authorities cited by Mr. Sircar, *Davis v. Bromley Corporation* (1) and *Smith v. Chorley Rural Council* (2), seem to establish clearly, first of all, that no suit lies against the Calcutta Corporation for wrongly refusing to approve of the building plans. That is the decision in *Davis v. Bromley Corporation* (1), and the decision in *Smith v. Chorley Rural Council* (2) is an authority for the proposition that a writ of *mandamus* does not lie against a local authority who in good faith refuses to pass building plans. If it had been done in bad faith, then the person whose plans had been rejected would have a remedy by way of a writ of *mandamus* to the local authority to proceed in the manner provided by law. In no case has the person a right of suit to have the plans approved, or for damages. These two decisions

(1) [1908] 1 K. B. 170.

(2) [1897] 1 Q. B. 678.

apply in principle as much to the Calcutta Municipality as to local authorities under the Public Health Act. Therefore, in my opinion, a suit does not lie in this Court, by a person whose plans have been rejected by the Chairman and the General Committee, for a declaration that the plans comply with the terms of the Act and should therefore be approved. His only remedy if the plans have been rejected *mala fide* is an application under section 45 of the Specific Relief Act for an order to compel the Chairman and the General Committee to hear the matter in the manner provided by the law. In the face of these two authorities the plaint discloses no cause of action either against the Chairman of the Corporation or against the General Committee. Any right the plaintiff may have with reference to the illegal, harsh, arbitrary and *mala-fide* action, if he can establish the same, will be by coming to the Court under section 45 of the Specific Relief Act. It seems to me that the plaintiffs have sought the wrong remedy. I understand that since the institution of the suit the Corporation have granted leave to build. It is said that the projected new street has been abandoned. However that may be, that does not give the plaintiffs a right of action. In my opinion the plaint discloses no cause of action and the suit must be dismissed with costs.

1913  
 PROSAD  
 CHUNDER DE  
 v.  
 CORPORATION  
 OF  
 CALCUTTA.

*Suit dismissed.*

Attorney for the plaintiffs: *H. N. Datta.*

Attorney for the defendants, the Corporation and the Chairman: *M. L. Seal.*

J. C.



being entrusted with the collections made on account of chowkidari-tax, in your capacity of a public servant, as a collecting pauchayat of Union VI of thana Domkal, dishonestly misappropriated a total sum of 10 annas 6 pies to wit, a sum of 4 annas 6 pies collected from Atal Mistri, between the 15th *Joisto* 1318 (29th May 1911) and the 14th *Bhadra* 1318 (31st August 1911), and a sum of 6 annas collected from Rajani Nath between the 20th *Assar* 1318 (5th July 1911) and the 18th *Aghron* (4th December 1911), and thereby committed an offence under section 409 of the Penal Code..."

1913  
 ASGAR ALI  
 BISWAS  
 v.  
 EMPEROR.

The petitioner was convicted under the section specified in the charge, and sentenced to one year's rigorous imprisonment and a fine of Rs. 100. On appeal, the Sessions Judge of Murshidabad, by his order dated the 20th January, 1913, acquitted him in respect of the smaller sum, on the ground that the prosecution had failed to prove that it had been collected by him, but upheld the conviction as to the other amount, and reduced the sentence to six months' rigorous imprisonment and a fine of Rs. 50. The petitioner thereupon moved the High Court and obtained the present Rule.

*Babu Dasarathy Sanyal* (with him *Babu Upendra Nath Bagchi*), for the petitioner. Under section 233 of the Code the Magistrate should have framed two separate charges, as the act of misappropriation of the sum paid by A is distinct from that in respect of the amount paid by B, and the accused committed really two different offences. The conviction is bad in law: see *Subrahmanya Ayyar v. King-Emperor* (1).

No one appeared for the opposite party.

HARINGTON J. This is a Rule calling on the District Magistrate to shew cause why the conviction and sentence should not be set aside on the third ground mentioned in the petition. The third ground is that the joinder of two distinct offences under one charge is an illegality which is fatal to the proceedings.

1913

ASGAR ALI  
BISWAS  
v.  
EMPEROR.

HARRINGTON  
J.

We have looked at the charge, and I agree that the charge, as it stands, is an illegal charge, having regard to section 233 of the Criminal Procedure Code. There are two distinct offences, and for each offence a separate charge ought to have been made. Though certain provisions in the Code provide that more than one charge may under certain circumstances be tried together, that does not justify the inclusion in one charge of several distinct offences, and as that is an illegality, in my opinion, the Rule must be made absolute and the conviction set aside.

With regard to the future, it will be a matter for the Magistrate to consider whether this man ought to be put on his trial again or not. It was stated in the course of the argument that he has suffered three months' imprisonment. That would be one matter which the Magistrate will take into consideration. In my view, the matter should be left to his discretion to decide whether he should prosecute the man further or not.

COXE J. I agree that the Rule should be made absolute, though with great reluctance, as it is perfectly clear that the defect in the charge has never made the least difference to the petitioner. We are bound, however, by the decision in *Subrahmania Ayyar v. King-Emperor* (1), and the charge framed being illegal, the conviction cannot be sustained.

I agree also in leaving it to the Magistrate to decide whether the proceedings against the accused should continue, and I do not desire to hamper him in any way in dealing with the question.

*Rule absolute.*

E. H. M.

## CRIMINAL REVISION.

*Be, ore Harington and Coxe JJ.*

SUBED ALI

v.

EMPEROR.\*

1913

April 10.

*Attachment—Warrant—Penal Code (Act XLV of 1860), s. 147—Nazir's power of Delegation—"Bailiff"—Civil Procedure Code (Act V of 1908), O. XXI, r. 25.*

Where a nazir directed a peon to attach property and fixed a time within which the attachment was to take place and the peon executed the warrant of attachment after the expiration of the time so fixed :—

*Held*, that the peon, deriving his authority from the Court to make the seizure, could lawfully make the seizure even after the time fixed by the nazir for the execution had expired.

The nazir and bailiff are not the same person. The officer to whom O. XXI, r. 25 of the Civil Procedure Code refers is not the nazir, but the peon.

*Dharam Chand Lall v. Queen-Empress (1) distinguished.*

THE facts of the case are these. One Ambica Singh lodged a complaint in the Court of the Subdivisional Officer of Narainganj to the effect that the petitioners and several others rescued the cattle of one Rameshwar Dutt which had been attached by a Civil Court peon in execution of a decree obtained against Ramsunder Dutt by a certain Moti Lall Singh. Thereupon the petitioners were charged with rioting and causing hurt to the attaching party and were subsequently convicted and sentenced to various terms of imprisonment by the Subdivisional Magistrate of Narainganj.

\* Criminal Revision No. 315 of 1913, against the order of G. B. Mumford, Sessions Judge of Dacca, dated Jan. 13, 1913.

(1) (1895) I. L. R. 22 Calc. 596.



1913  
SUBED ALI  
v.  
EMPEROR.

The warrant was addressed to the bailiff. The nazir endorsed it to a peon with instructions to execute it by the 25th of August 1912, but the warrant itself could be enforced till the 30th of August—the date originally fixed for its execution by the issuing Court. The peon executed it, however, on the 26th of August 1912.

Against the order of the Subdivisional Officer the petitioners appealed to the District Judge of Dacca, who dismissed their appeal. Against this order of dismissal the petitioners moved the High Court and obtained this Rule.

*Babu Harendra Narain Mitter* (with him *Babu Bhudeb Chunder Roy*), for the petitioners, contended that the warrant was delegated to the nazir and as such nobody except the person to whom the Court delegated the warrant, was competent to execute it. The nazir, as a matter of fact, was not empowered by law to delegate his authority and therefore he could not delegate it to the peon. Further, he submitted, that even if he had the power to make the warrant over to the peon for execution the peon was bound by the terms of his delegation, *i.e.*, he was bound to execute the warrant according to the direction of the nazir, on or before the 25th of August, and not beyond that date. Inasmuch as he executed the warrant on the 26th of August it was not a lawful execution and the petitioners therefore were well within their rights in resisting the execution. The attachment, therefore, being illegal the petitioners committed no offence in resisting it: *Dharam Chand Lall v. Queen-Empress* (1) and *Sheo Prakash Tewari v. Bhoop Narain Prosad Pathak* (2).

(1) (1895) I. L. R. 22 Cal. 596.

(2) (1895) I. L. R. 22 Cal. 759.

*Babu Srish Chandra Chowdhury*, for the Crown,  
was not called upon.

1913  
SUBED ALI  
v.  
EMPEROR.

HARINGTON J. This is a Rule calling on the District Magistrate to show cause why the conviction should not be set aside on the first ground mentioned in the petition. That ground runs in these terms—that the conviction is bad in law, in that the attachment of the cattle, by the peon whose power to act under the warrant had expired, was illegal.

The whole question raised by this rule was: Was the peon's act in attaching the cattle illegal under these circumstances?

The warrant was a warrant addressed to the bailiff, the English word "bailiff" appearing on the face of it in Bengali character. The nazir of the Court, who appears to have superintendence over the persons who execute the warrants, endorsed it with a direction to the particular bailiff in question to execute it within a particular day; but the warrant itself was a good warrant for some days beyond that date. The bailiff should have executed it, according to the direction of the nazir, on or before the 25th August, but the warrant issued by the Court could be legally enforced up to the 30th August. The question is, whether the execution by the peon between the 25th and 30th is a lawful execution? In my opinion it is.

The point that strikes me is that the warrant was addressed to the bailiff. Now "bailiff" is a very well-known English word and is used to describe the officer who actually conducts executions. When an execution is put into a house, it is the bailiff who goes and seizes the furniture, it is the bailiff who takes actual physical possession of the furniture and becomes the man in possession who prevents it from being carried away. In my view, the fact that the

1913  
 SUBED ALI  
 v.  
 EMPEROR.  
 HARRINGTON  
 J.

warrant is addressed to the bailiff shows that it is the person who actually makes the seizure who is authorised by it, namely, the peon. If the warrant had been intended to go to the nazir, it would have been so addressed, but as it was addressed to the bailiff, it must have been addressed to a person who in this country follows the description of a bailiff, that is, a peon.

For that reason, the peon who made the seizure derived his authority from the Court that issued the warrant and not from the nazir who endorsed it. That authority was not lessened by the circumstance that the officer who has general charge of the "bailiff" or peon, namely, the nazir, directed him to do his duty within a particular time. He did not do it within the time; he still had authority from the Court to make the seizure though, as far as his duty to the nazir was concerned, he ought to have made it at an earlier date.

For these reasons, I think that the Rule should be discharged.

The case of *Dharam Chand Lall v. Queen-Empress* (1) was cited by the learned vakil who argued in support of the Rule. But that case was entirely different; because in that case the warrant was directed to the nazir, and not only was it directed to the nazir, but to a particular nazir by name, and the question which the learned Judges discussed in that case was how far the nazir, who by name was authorised to execute the warrant, could delegate his authority to another officer. That case has nothing to do with the present, in which the warrant was directed to the bailiff, and not to any particular person by name.

The Rule must be discharged.

COXE J. I agree that the Rule should be discharged.

It does not appear that any question of delegation arises in this case at all. The argument of the learned vakil for the petitioners, that this warrant was delegated by the nazir to the peon, was founded on the assumption that the word "bailiff" used in the form means and only means the nazir. There is no reason, so far as I can see, why the term "bailiff" should be confined to the nazir. There are several reasons why it should not.

On a reference to Order XXI. rule 25, it will be seen that the warrant is referred to the officer entrusted with the execution of the process, and it is clear from the terms of that section that that officer is not the nazir, but is the peon. That officer has to endorse on it the day on, and the manner in, which it is executed. This is done by the peon. If the process is not executed, the Court has to examine the officer touching his alleged inability to execute it. It is only the peon who can give evidence on this point. The nazir's evidence would be purely hearsay. It seems to me that the officer to whom Order XXI, rule 25, refers can only be the peon.

On referring to the form itself, the process is addressed to the bailiff of the Court, and on the back we find space allowed for the date on which the order is made over to the nazir, the date on which it is returned by the serving officer, and so on. If the nazir and bailiff are the same person, it is difficult to understand why the same word should not be used throughout.

No doubt, the process does pass through the hands of the nazir on its way from the Court to the executing officer, who, in my opinion, is the bailiff. The Court has perhaps fifty peons attached to it, and it is impossible for the Court to entrust the execution to

1913  
 SUBED ALI  
 v.  
 EMPEROR.  
 COXE J.

1913  
 SUBED ALI  
 v.  
 EMPEROR.  
 COXE J.

individual peons, and, consequently, it is the nazir's duty, not to delegate his authority, but to distribute the processes which are received by his department among the various officers entrusted with their execution. That, in my opinion, does not amount in any way to delegation.

I think, therefore, that the officer who was entrusted with the execution of the process was the peon, or the bailiff, as he is described in it. He was the attaching peon and consequently his custody of the property was lawful, and the accused were guilty of an offence in rescuing that property from him.

S. K. B.

*Rule discharged.*

### CRIMINAL REVISION.

*Before Imam and Chapman JJ.*

ABDULLAH MANDAL

1913  
 April 16.

v.

EMPEROR.\*

*Cognizance—Police report—Case made over to another Magistrate for enquiry and report—Criminal Procedure Code (Act V of 1898) ss. 173, 190 (1) (b)—Practice.*

Where a Magistrate, upon receiving a police report under s. 173, does not take cognizance of the case under s. 190 (1) (b), which he is perfectly competent to do, but makes it over for enquiry and report to an Honorary Magistrate, he acts contrary to the provisions of the Law.

THE facts are briefly these. One Nasirul Huq laid a charge of theft of a bullock belonging to his brother-in-law, Panchcowrie Shaikh, at the thana of Dadpur, against the petitioners. The police enquired

\* Criminal Revision No. 347 of 1913, against the order of A. B. De, Subdivisional Officer of Hooghly, dated Jan. 18, 1913.

into the case and submitted a report to the Subdivisional Magistrate of Hooghly to the effect that there was no reliable evidence forthcoming to support the charge. The Subdivisional Magistrate thereupon made over the case to an Honorary Magistrate to enquire and report. An elaborate inquiry was made and the learned Honorary Magistrate reported that he could not recommend the trial of the petitioners for theft, as it was conclusively proved that the bullock had been purchased by Abdullah, one of the petitioners. Upon this report the Subdivisional Magistrate issued summonses against the petitioners. Against this order of the Magistrate the petitioners moved the High Court and obtained this Rule.

*Babu Manmatha Nath Mukerjee*, for the petitioners, contended that the Magistrate acted contrary to law in making over the case to the Honorary Magistrate for enquiry and report. He should have taken cognizance of the case himself and dealt with it under section 190, clause *b*, of the Criminal Procedure Code. He could not treat the police report as a complaint under section 200 of the Code of Criminal Procedure. Further, he submitted that the matter was fully gone into before the Honorary Magistrate, and the evidence did not disclose any offence. It would be most harassing to the petitioners to go to trial upon evidence such as was adduced at the preliminary enquiry.

IMAM AND CHAPMAN JJ. This was a Rule calling on the District Magistrate of Hooghly to show cause why the order dated the 6th January, 1913, should not be set aside.

Information was given to the police by the complainant, Nasirul Huq, at the thana of Dadpur, in respect of the theft of a bullock belonging to his brother-in-law, Panchcowrie Shaikh, by the petitioners

1913  
—  
ABDULLAH  
MANDAL  
v.  
EMPEROR.

1913

ABDULLAH  
MANDAL  
v.  
EMPEROR.

Abdullah Mandal and Neamul Huq. The police, on such information being recorded, submitted a report to the Magistrate in which they stated that the case against the accused might be true, but that the evidence to prove it was not forthcoming. Thereupon the Subdivisional Magistrate made over the case to Mr. N. K. Bose, an Honorary Magistrate, for the purposes of enquiry and report. The Honorary Magistrate examined a number of witnesses on both sides and then submitted a report to the Subdivisional Magistrate, in which he expressed his opinion that it was amply proved that the bullock had been purchased by Abdullah, and that therefore he could not recommend a trial of the accused under section 379 Indian Penal Code. On receipt of this report, the Subdivisional Magistrate ordered the issue of summonses against the petitioners, and in his order remarked that the purchase of the animal by the accused should be established in Court.

The proceedings of the Subdivisional Magistrate are open to attack on grounds of law and fact alike. A report having been submitted by the police under section 173, it was open to the Magistrate to take cognizance of the case under section 190, clause (b), of the Criminal Procedure Code. But he did not choose to do so and proceeded to make over the case for enquiry and report, as though the matter he was dealing with was one on a complaint under section 200 of the Code. The proceedings before the Honorary Magistrate, thereafter, so far as they bear on the case based on a police report, were not in consonance with the provisions of the law. We might have been disposed to overlook the proceedings that were erroneously held before the Honorary Magistrate and should have treated the order of the Subdivisional Magistrate for the issue of summonses against the accused persons

as one passed under section 190, clause (b), had not the petitioners based their contention for the dropping of these proceedings on another ground as well. They say that the facts disclosed before the Honorary Magistrate do not justify the trial of the accused persons. Ordinarily, we would not be disposed to interfere with the discretion of the Magistrate, if it were not for exceptional circumstances, namely, the examination of a number of witnesses before the Honorary Magistrate having already had the effect of causing the two parties a great deal of trouble. If these proceedings before the Magistrate had disclosed facts which led us to believe that the trial would be in the interest of justice, we should have had no hesitation in allowing the proceedings to go on. But the enquiry by the police as well as by the Honorary Magistrate disclosing the fact that there is no case against the petitioners that could be rightly tried, and the Subdivisional Magistrate not having given sufficient ground for not agreeing with the Honorary Magistrate and the police, we are not disposed to allow the proceedings to go on.

The order, therefore, is, that this Rule be made absolute, the order of the Magistrate dated the 6th January, 1913, set aside, and the proceedings stayed. If the petitioners are on bail, they will be discharged from their bail.

S. K. B.

*Rule absolute.*

1913  
ABDULLAH  
MANDAL  
v.  
EMPEROR.



**APPELLATE CIVIL.***Before Chapman and Mullick JJ.***GURU CHARAN HAJAM***v.***SUKLAL HAJAM.\***

1913

*April 18.*

*Ejectment—Chota Nagpur Tenancy Act (Beng. VI of 1908), ss. 4(3), 41—Non-occupancy raiyats—Under-raiyats, ejectment of—Transfer of Property Act (IV of 1882), s. 106—Incidents of tenancy created by contract or custom—Verbal notice, sufficiency of.*

Where a raiyat sued an under-raiyat in ejectment and got a decree but, on appeal, the Judicial Commissioner of Chota Nagpur dismissed his suit on the ground that the provisions of s. 41 of the Chota Nagpur Tenancy Act had not been complied with, as an under-raiyat has at least the rights of a non-occupancy raiyat :

*Held*, that the view taken by the Judicial Commissioner was erroneous. An under-raiyat must for the purposes of that Act be treated as belonging to a class of tenants quite distinct from the class of non-occupancy raiyats. Those portions of that Act which dealt with tenants generally could be applied to under-raiyats.

In a suit for ejectment of an under-raiyat by a raiyat, the Court can have regard only to the relations established between the parties either by contract or custom.

Where there is no evidence of a lease, the tenancy would no doubt be ordinarily held to be a tenancy from year to year.

There is no statutory provision that the tenancy of an under-raiyat in Chota Nagpur can be terminated only by a notice in writing.

**SECOND APPEAL** by Guru Charan Hajam, the plaintiff.

The facts are briefly as follows.

\* Appeal from Appellate Decree, No. 2424 of 1911, against the decree of D. H. Kingsford, Judicial Commissioner of Chota Nagpur, dated July 15, 1911, reversing the decree of J. Macpherson, Deputy Collector of Khunti, dated Aug. 3, 1910.

The defendant held certain plots of land as a *dar-raiyat* under the plaintiff, who was a raiyat of Gitilbera. As the plaintiff wished to take the defendant's lands in his *khas* cultivation, he orally asked the defendant to give up possession of these plots of land in the month of Pous. The Deputy Collector of Khunti decreed plaintiff's suit for ejectment, but, on appeal by defendant, the Judicial Commissioner of Chota Nagpur dismissed the suit, holding "that the plaintiff neither proved nor alleged any of the grounds under section 41, Chota Nagpur Tenancy Act, which grounds are the only ones upon which a raiyat possessing non-occupancy rights (which are the least rights that defendant can possess) may be ejected." The plaintiff thereupon appealed to the High Court.

*Babu Shib Chandra Palit*, for the appellant. Section 41 of Beng. Act VI of 1908 has no application to this case. It deals with ejectment of non-occupancy raiyats. The defendant is an under-raiyat. Section 4, cl. (3), shows there is a distinct class of tenants called under-raiyats. There is no provision in the Act laying down the procedure to be followed in order to eject an under-raiyat. Verbal notice has been given to the under-raiyat determining his tenancy: *Ram Narayan Sahu v. Maangru Urao*(1). He is liable to ejectment.

*Babu Kshetra Mohan Sen*, for the respondent. An under-raiyat must be treated as a non-occupancy raiyat in a suit for ejectment. There being no distinct provision for the ejectment of an under-raiyat, the provisions of section 4, of the Chota Nagpur Tenancy Act apply. As regards the notice, it was insufficient.

1913  
GURU  
CHARAN  
HAJAM  
v.  
SUKLAL  
HAJAM

*Cur. adv. vult.*

1913

GURU  
CHARAN  
HAJAM  
v.  
SUKLAL  
HAJAM

CHAPMAN AND MULLICK JJ. The appellant is a raiyat. He sued the defendant, who is an under-raiyat, in ejectment. The learned Judicial Commissioner has in appeal dismissed the appellant's suit upon the ground that the provisions of section 41 of the Chota Nagpur Tenancy Act have not been complied with. That section provides that non-occupancy raiyats shall not be ejected, except upon certain grounds, and the learned Judicial Commissioner holds that an under-raiyat has at least the rights of a non-occupancy raiyat. This view is in our opinion erroneous. It is clear from the definitions in section 4 of the Act that an under-raiyat must for the purposes of the Act be treated as belonging to a class of tenants quite distinct from the class of non-occupancy raiyats. It is true that there is no provision in the Act dealing separately with the class "under-raiyats" defined in section 4, but that does not do away with the effect of the definitions in section 4, which is that where the Act refers to non-occupancy raiyats the reference must not be taken to include under-raiyats. It is only those provisions of the Act which deal with tenants generally that can be applied to under-raiyats.

The result is that, for the purpose of deciding the questions raised by a suit for the ejectment of an under-raiyat by a raiyat, the Court can have regard only to the relations established between the parties either by contract or by custom. Where there is evidence of a lease (oral or written), the matter must be decided by reference to that evidence. Where there is no evidence of a lease, the tenancy would no doubt be ordinarily held to be a tenancy from year to year (section 106, Transfer of Property Act, by analogy), the year for this purpose being held to be the agricultural year. It is also necessary to bear in mind that, before a suit in ejectment of a tenant of

any kind can rightly succeed, it must be shown that the tenancy has been terminated. But there is no statutory provision that the tenancy of an under-raiyat in Chota Nagpur can be terminated only by a notice in writing.

In the present case it may be taken that the under-raiyat is a tenant from year to year. The appellant asserted that he asked the defendants to give up possession in Pous of the previous year. This assertion was not denied in the written statement, and no point in connection with the sufficiency of the notice was raised in either of the Courts below. No custom of right to notice for any particular period was ever alleged, and it was never suggested that the time given to quit was unreasonably short, or that the period of the notice did not expire with the periodic year of the tenancy. We take it, therefore, that the tenancy was terminated before the suit was brought. The appellant was, therefore, entitled to succeed. The appeal is allowed. The judgment and decree of the learned Judicial Commissioner is set aside. The suit is decreed with costs in all Courts. The appellant is entitled to *khas* possession.

G. S.

*Appeal allowed.*

1913  
GURU  
CHARAN  
HAJAM  
v.  
SUKLAL  
HAJAM.

## APPELLATE CIVIL.

*Before Sharfuddin and Richardson JJ.*

1913

April 22.

BIDYAPRASAD NARAIN SINGH

*v.*

ASHRAFI SINGH.\*

*Receiver, appointment of—Civil Procedure Code (Act V of 1908), O. XL, r. 1—Powers of Civil Court when Receiver in possession under s. 146 (2), Criminal Procedure Code (Act V of 1898)—Conditional appointment—Former Receiver, reappointment of.*

The appointment of a receiver by a Civil Court under O. XL, r. 1, of the Code of Civil Procedure does not operate as a discharge of the receiver of the same properties already appointed by a Magistrate under section 146 (2) of the Code of Criminal Procedure.

As a general rule when there is a receiver in possession appointed by the Magistrate, and application is made to the Civil Court to exercise its powers under O. XL, r. 1 of the Code of Civil Procedure, the Civil Court should make a conditional order of appointment and inform the Magistrate so that the latter may have an opportunity of withdrawing his attachment.

Unless there is good reason to the contrary, the Civil Court should, as a matter of judicial discretion, appoint as its receiver the person already appointed by the Magistrate.

*Burkat-un-nissa v. Abdul Aziz* (1) distinguished.

APPEAL by Bidyaprasad Narain Singh and Sri-prasad Narain Singh, two of the defendants.

This appeal arose out of a suit for the possession of certain immoveable properties. In the course of certain criminal proceedings between the parties the Subdivisional Magistrate, in exercise of his powers

\* Appeal from Original Order, No. 424 of 1912, against the order of Kishori Lal Sen, Subordinate Judge of Mozafferpore, dated June 5, 1912.

under section 146 of the Code of Criminal Procedure, attached the greater part of the properties in dispute, and appointed one Mr. Stevens as receiver thereof. Subsequently in this suit, on the application of the plaintiffs and with the consent of one of the defendants, the Subordinate Judge appointed one Babu Jatadhari Prasad receiver of the properties in suit under O. XL, r. 1, of the Code of Civil Procedure.

This appointment was made on April 26, 1912.

Thereupon the remaining defendants and Mr. Stevens presented petitions to the Court, stating that the order of April 26, 1912, had been obtained without their knowledge, praying that Mr. Stevens should be retained as receiver, and submitting that the Subordinate Judge had no jurisdiction to remove him.

On June 5, 1912, the Subordinate Judge dismissed these petitions, and confirmed his previous order appointing Babu Jatadhari Prasad receiver.

The defendants, Bidyaprasad Narain Singh and Sriprasad Narain Singh, thereupon appealed to the High Court.

*Babu Shorashi Charan Mitra*, for the appellants. The Subordinate Judge had no power to make an interlocutory order interfering with the possession of the receiver validly appointed by the Magistrate. The receiver's possession can only be terminated by an order of the Court that appointed him, or by the final determination of the rights of the parties in the Civil Court. Order XL, rule 1 (2), of the Code of Civil Procedure prevents the removal of the Magistrate's nominee. As a general principle a Court will not appoint a receiver when there is already a receiver appointed in other proceedings: see Lord Halsbury's "Laws of England," volume 24, Title—

1913  
BIDYAPRASAD  
NARAIN  
SINGH  
v.  
ASHRAFI  
SINGH.

“Receivers”, page 370. If an appointment is made, the person already in possession as receiver under the order of the other Court should be appointed: *In the Estate of F. J. Cleaver* (1).

*Babu Lachmi Narain Singh* and *Babu Baldeo Narain Singh*, for the respondents. The order of the Subordinate Judge was right. The Magistrate’s order is only operative until a competent Civil Court takes seisin of the matter: *Barkat-un-nissa v. Abdul Aziz* (2). The Legislature could not have intended that the order of the Magistrate should be a bar to the exercise of the ordinary powers of the Civil Court. The language of the Court in *Lokenath Shah Chowdhry v. Nedu Biswas* (3) shows that the possession of the Magistrate is regarded as merely temporary.

*Cur. adv. vult.*

SHARFUDDIN AND RICHARDSON JJ. The question for our consideration is whether the Subordinate Judge has correctly decided that a Civil Court acting under Order XL of the Civil Procedure Code has power to appoint a receiver in supersession of the receiver appointed by the Magistrate under clause (2) of section 146 of the Criminal Procedure Code.

When there is a dispute as to immoveable property likely to cause a breach of the peace, and the Magistrate, having made an order in the terms of section 145 of the latter Code, is unable to decide which of the parties was in actual possession at the date of such order, he is empowered by clause (1) of section 146 to attach the subject of dispute “until a competent Court has determined the rights of the parties thereto or the person entitled to possession

(1) [1905] P. 319.

(2) (1900) I. L. R. 22 All. 214.

(3) (1902) I. L. R. 29 Cal. 382.

thereof". Clause (2) of the section provides that "when the Magistrate attaches the subject of dispute he may, if he thinks fit, appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure".

1913  
BIDYAPRASAD  
NARAIN  
SINGH  
v.  
ASHRAFI  
SINGH.

The possession of a receiver so appointed is the possession of the Magistrate who appoints him, and the Magistrate has possession or custody under a statutory power or title good against the parties to the dispute until a judicial determination is arrived at by the proper Court in regard to "the rights of the parties" or "the person entitled to possession". An interlocutory order of a Civil Court appointing a receiver does not amount to such a determination, and cannot therefore have the effect of discharging the Magistrate's attachment, or enable the Court to remove the receiver appointed by the Magistrate. The order made by the learned Subordinate Judge in this case assumed, contrary to the fact, that one of the parties to the suit had at the time the right to terminate the Magistrate's attachment or which is the same thing to remove the Magistrate's receiver. The learned Subordinate Judge says that in virtue of the suit instituted before him he has seisin of the land. So he has *quoad* the parties to the suit. But he has overlooked clause (2) of rule 1 of Order XL which says that nothing in the rule shall "authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove". None of the parties to the suit has a present right to interfere with the Magistrate's possession. The whole object of the attachment is to vest the possession or management of the property in the Magistrate safe from any interference of the parties. The mere institution of the suit clothes the



1913

BIDYAPRASAD

NARAIN

SINGH

v.

ASHRAFI

SINGH.

Civil Court with no right or power not then possessed by one or other of the parties before it. It does not give the Court a right to possession *contra mundum*.

There is no question of the relative superiority or inferiority of one Court in relation to another. It is sufficient to say that the two Courts—the Court of the Magistrate which first dealt with the dispute between the parties under the Criminal Procedure Code, and the Court of the Subordinate Judge before whom the dispute is subsequently brought—are independent Courts, and, apart from some special provision or power, a prior legal possession or custody obtained by the one must be respected by the other. The two cases referred to by the Subordinate Judge do not support his view. The case of *Barkat-un-nissa v. Abdul Aziz* (1) turns not upon the language of section 146 of the Criminal Procedure Code, but upon the different language used in section 145, where a power is given to the Magistrate, in the event of his finding possession to be with one of the parties, to declare that party entitled to retain possession until he is “evicted in due course of law”. In *Lokenath Shah Chowdhry v. Nedu Biswas* (2), the High Court refused to interfere with the management by the Magistrate of property attached under section 146, on the ground that the intervention of the Magistrate was only temporary, and a remedy could be obtained in the Civil Court. The point before us was not before the Court, and we do not lay too much stress on observations in the judgment not directed to that point. It is clear, however, that the remedy which the Judges contemplated was a remedy by way of final decision of the respective rights of the parties. “It is beyond doubt”, they say, “that recourse must be had to the Civil Court for a final settlement of the matter in

(1) (1900) I. L. R. 22 All. 214.

(2) (1902) I. L. R. 29 Calc. 382.

dispute, pending which the Magistrate by an attachment holds the land ”.

Though the Magistrate, however, has an abstract right to retain possession, it is also within his discretion to withdraw his attachment. We do not suppose that any Magistrate would desire to retain possession of property attached under section 146, or to be responsible for the management of such property longer than is necessary in the interest of peace and order which is his sole interest in the matter. It appears to us that when the dispute comes before the Civil Court and that Court acting of its own motion, or at the instance of one or other of the parties before it, thinks that a receiver should be appointed, it should make a conditional order. The receiver may be appointed conditionally on the Magistrate withdrawing his attachment. On the Magistrate being approached after this order is made, we are of opinion, speaking generally and without intending to lay down a rule applicable to all circumstances, that it would be a wise and proper exercise of discretion on the Magistrate's part to withdraw his attachment. The effect of the withdrawal of the attachment would be to remove the receiver, if any, appointed by the Magistrate, and so leave the field open for the receiver appointed by the Civil Court. Unless, however, the concurrence of the Magistrate is obtained in this or some other way, the receiver appointed by the Magistrate cannot be removed before the time fixed by section 146.

As to the selection of a receiver, in the event of a Civil Court deciding to take such a course as that which we have suggested, here also the exercise of a discretion is involved. The Civil Court has a discretion to continue the receiver appointed by the Magistrate or to appoint some one else as receiver,

1913

BIDYAPRASAD  
NARAIN  
SINGH  
v.  
ASHERAFI  
SINGH.

1913  
BIDYAPRASAD  
NARAIN  
SINGH  
v.  
ASHRAFI  
SINGH.

and, in the absence of good reason to the contrary, it appears to us wiser and more prudent that the receiver appointed by the Magistrate should be continued. A change of management is in itself undesirable, and if a Magistrate's receiver is liable to be removed when a suit is instituted, it may be difficult for the Magistrate to find a proper person for the post. In the case before us it appears that the land attached by the Magistrate forms a great part though not the whole of the land which is the subject matter of the suit before the Subordinate Judge. It is not suggested that Mr. Stevens, the receiver appointed by the Magistrate, had been guilty of mismanagement or was in any way unfit for the post. On the contrary when the plaintiffs applied to the Subordinate Judge to appoint a receiver, they suggested that the appointment should be given to Mr. Stevens. So far as the materials for forming a conclusion are before us, it appears to us that the Subordinate Judge, assuming that he was in a position to appoint a receiver, would have made a wiser choice if he had selected Mr. Stevens. If he had done so there would probably have been no difficulty.

The Subordinate Judge made two orders in this connection, an order dated April 26, 1912, and an order dated June 5, 1912. The former order purported to remove Mr. Stevens and to appoint Babu Jatadhari Prasad to be receiver. It was made on the application of the plaintiffs to which we have referred and in the presence of the plaintiffs and the defendant No. 1 apparently by consent. Subsequently the other defendants as well as Mr. Stevens came in and preferred objections. After hearing arguments, the Subordinate Judge passed the second order confirming the first. The appeal before us, preferred by the objecting defendants, is expressed to be from the

second order. It was suggested for the respondents that no appeal lies from that order inasmuch as it was merely confirmatory. There is no substance in this contention. The Civil Procedure Code, Order XLIII, rule 1 (s), allows an appeal from an order made under rule 1 of Order XL. The first order which was made behind the back of the appellants must be regarded as merged in the second. In substance and effect the appeal is from an order appointing a receiver which purports to be made under rule 1 of Order XL. Such an order is appealable under Order XLIII.

The result is that the appeal is allowed to this extent, that both the orders of the Subordinate Judge are set aside and the matter is remitted to him to be dealt with in the light of the observations which we have made. The appellants are entitled to their costs already incurred in this connection in this Court and the Court below. Further costs will be in the discretion of the Subordinate Judge.

The above order sufficiently disposes of the Rule issued at the instance of Mr. Stevens. Mr. Stevens is entitled to his costs in this Court and the Court below out of the attached property. As in the appeal, we make no order as to any further costs he may incur.

H. R. P.

*Appeal allowed.*

1913

BIDYAPRASAD  
NARAIN  
SINGH  
V.  
ASHRAFI  
SINGH.

## APPELLATE CIVIL.

*Before Richardson and Newbould JJ.*

1913

April 25.

BHUPENDRA NATH BOSE

v.

BANSI TANTI.\*

*Landlord and Tenant—Transfer of holding—Usufructuary mortgage of holding, effect of—Bengal Tenancy Act (VIII of 1885), s. 25—Abandonment—Forfeiture.*

An unauthorized transfer of a holding or the parting with possession of it, in whole or in part, does not *per se* work a forfeiture under the Bengal Tenancy Act. Transfer by way of usufructuary mortgage stands on the same footing as other partial transfers.

*Kabil Sardar v. Chandra Nath Nag Choudhry* (1); *Mathura Mandal v. Ganga Charan Gope* (2); referred to.

*Baroda Charan Dutt v. Hemlata Dassi* (3), commented on.

*Rasik Lal Datta v. Bidhumukhi Dasi* (4), *Rajendra Kishore Adhikari v. Chandra Nath Dutt* (5), *Krishna Chandra Datta Chowdhury v. Khiran Bajania* (6) distinguished.

SECOND APPEAL by Bhupendra Nath Bose and others, the plaintiffs.

This appeal arises out of a suit brought by the landlords for khas possession of a holding on the allegation that the tenants had abandoned it by executing a usufructuary mortgage, giving up possession of the land and ceasing to pay rent. The learned Munsif dismissed the suit finding that the tenants had continued to pay the rent of the holdings. The plaintiffs

\* Appeal from Appellate Decree, No. 2715 of 1911, against the decree of A. Mellor, District Judge of Darbhanga, dated June 5, 1911, confirming the decree of Shyam Narain, Munsif of Samastipur, dated Sep. 12, 1910.

(1) (1892) I. L. R. 20 Calc. 590.

(4) (1906) I. L. R. 33 Calc. 1094

(2) (1906) I. L. R. 33 Calc. 1219.

(5) (1507) 12 C. W. N. 878.

(3) (1908) 13 C. W. N. 242.

(6) (1903) 10 C. W. N. 499.

then appealed to the District Judge of Darbhanga, who dismissed their appeal with costs. Against that decision the plaintiffs preferred this second appeal to the High Court.

*Babu Shorashi Charan Mitra*, for the appellants.  
No one appeared for the respondent.

1913  
BHUPENDRA  
NATH  
BOSE  
v.  
BANSI  
TANTI.

RICHARDSON AND NEWBOULD JJ. This second appeal, preferred by the plaintiffs, is rested on the ground that the mere fact that the tenants defendants mortgaged their holding by way of usufructuary mortgage and put the mortgagee in possession, the holding not being transferable by custom, entitles the plaintiffs, who are the landlords, to re-enter. The decision in the case of *Baroda Charan Dutt v. Hemlata Dassi* (1), to which reference has been made, is not inconsistent with the earlier decisions of this Court. In the course of the judgment at page 244 of the report the learned Judge observed that the usufructuary mortgagee had been in possession for several years, and that during that period the tenants had had no connection with the land. The current of authorities shows that the unauthorised transfer of a holding, or the parting with the possession of it, in whole or in part, does not *per se* work a forfeiture under the Bengal Tenancy Act. There must be something more, something in the nature of an abandonment by the tenant or something of that kind. Reference may be made to the cases of *Kabil Sardar v. Chandra Nath Nag Chowdhry* (2) and *Mathura Mandal v. Ganga Charan Gope* (3). In the case of *Baroda Charan Dutt v. Hemlata Dassi* (1), Mr. Justice Doss cited two cases, *Krishna Chandra Datta Chowdhry v. Khiran Baiania* (4) and *Rasik Lal Datta*

(1) (1908) 13 C. W. N. 242.

(3) (1906) I. L. R. 33 Calc. 1219

(2) (1892) I. L. R. 20 Calc. 590

(4) (1903) 10 C. W. N. 499.

1913  
 BHUPENDRA  
 NATH  
 BOSE  
 v.  
 BANSI  
 TANTI.

v. *Bidhumukhi Dasi* (1). In the latter case there was an abandonment by the tenant. The former case arose in the district of Sylhet, and was decided not under the provisions of the Bengal Tenancy Act, but under the provisions of Act VIII (B.C.) of 1869, which is the Act in force in that district. In the case of *Raiendra v. Chandra* (2), there was a relinquishment by the tenant in favour of the landlord. There appears to be no reason why the principle above referred to should not be applied to the case of a transfer by way of usufructuary mortgage in the same way as to other partial transfers. In the case before us there is a clear finding by the lower Appellate Court that there has been no abandonment by the tenant defendants, and with that finding we are unable to interfere in second appeal. We are of opinion that in the view which they took of the facts, the lower Courts were right in holding that the plaintiffs were not entitled to re-enter. The plaintiffs, of course, are not bound by the transfer. They are entitled to demand rent from the tenant defendants and are not obliged to accept rent from the mortgagee. With these observations the appeal is dismissed. No one appearing for the respondents we make no order as to costs.

S. K. B.

*Appeal dismissed.*

(1) (1906) I. L. R. 33 Cal. 1094.

(2) (1907) 12 C. W. N. 878.

## APPELLATE CRIMINAL.

*Before Imam and Chapman JJ.*

PULIN TANTI

v.

EMPEROR.\*

1913

April 28.

*Confession—Record of confession—Questioning the accused regarding its voluntariness at the end of the statement—Criminal Procedure Code (Act V of 1898), s. 164—Confession partly false, evidentiary value of.*

Where an enquiry as to the voluntary character of the confession is made by the Magistrate not at the commencement, but at the end, of the statement by the accused, the defect is merely one of form.

If a confession is found to be false in part, viz., as to the justifying motives for an offence, it does not follow that the rest of it, relating to the commission of the offence, must be rejected. Where the entire statement of a prisoner has been given in evidence any part of it may be contradicted by the prosecution, and if sufficient grounds exist, the Court may accept the incriminatory, and reject the exculpatory, portions.

*Rex v. Higgins* (1), *Rex v. Clewes* (2) *Rex v. Steptoe* (3) referred to.

THE appellant was tried by the Sessions Judge of Bhagalpore, with the aid of assessors, on a charge under s. 302 of the Penal Code. The latter found that the deceased had been murdered, but not by the appellant. The Judge, however, disagreed with their opinion, and convicted and sentenced the appellant to transportation for life.

It appeared that the deceased, Jhapani, was the widow of the brother of the appellant, who brought her from her father's house to his own, where she had lived with him and his mother for about two years

\* Criminal Appeal No. 182 of 1913, against the order of E. G. Drake-Brockman, Sessions Judge of Bhagalpur, dated Jan. 16, 1913.

(1) (1829) 3 C. & P. 603.

(2) (1830) 4 C. & P. 221.

(3) (1830) 4 C. & P. 397.



1913  
PULIN TANTI  
v.  
EMPEROR.

An intimacy had sprung up between the deceased and the appellant, resulting in her pregnancy. Thereafter frequent quarrels arose between them, and she referred these disputes to the village panchayat, at a meeting of which he admitted the paternity of the child and promised to maintain her. His mother was offended at the presence of the deceased in the house as it prevented the appellant's marriage with another woman. On the 5th November 1912, there was a quarrel, and the appellant struck her. Next morning her headless trunk was discovered on the railway lines running along the prisoner's house. Information was conveyed to the Permanent Way Inspector of Tildanga, D'Cruz, who went to the spot at 8 A.M. and spoke to the accused. The Railway Sub-inspector of Saheb-gunge arrived at the scene on the same evening, arrested the prisoner and kept him at Tildanga. On the 8th November, the appellant was produced before the Subdivisional Officer, who recorded his confession in which he admitted having throttled the deceased, cut her neck and placed the headless corpse on the railway track so as to suggest suicide. The Magistrate recorded the questions as to the voluntary character of the statement at its close. The appellant adhered to the statement on examination at the enquiry preliminary to commitment, but retracted it at the sessions trial, and alleged that it had been extorted by police torture.

The Sessions Judge convicted the prisoner, as stated above, on the 13th January 1913, whereupon he appealed to the High Court.

*Mr. Akbari* and *Moulvi Khorshed Hossain*, for the appellant.

*The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown.

*Cur. adv. vult.*

IMAM AND CHAPMAN JJ. The appellant, Pulin Tanti, has been convicted by the Sessions Judge of Bhagalpore under section 302 of the Indian Penal Code, and sentenced to transportation for life for killing his brother's widow whom he had been keeping as his mistress. The assessors were of the opinion that the deceased had been murdered, but they found no proof that the accused had caused her death.

1913  
PULIN TANTI  
v.  
EMPEROR.

The facts of the case appear to be these:—

After the deceased became a widow she went to live with her father, but after some time she was brought back by the appellant to his house to live with him and his mother. An intimacy between the two resulted in her pregnancy, followed by bickerings and quarrels between the deceased on one side and the appellant and his mother on the other. An appeal by the woman to the village community led to a panchayat, at which the appellant acknowledged the paternity of the unborn child and agreed to maintain her. This, instead of removing the unpleasantness, accentuated it, since the mother realized that the woman's presence was the cause of her son not marrying a wife in a regular way. On 5th November last, there had been a quarrel between the deceased and the appellant when it is said he struck her, and the next morning was found the headless corpse of the woman lying between the rails on the railway line which passes the village Saheb Nagar, the home of the accused. On information being received at Tildanga, a railway station, of the fact of a corpse lying on the line, the Permanent Way Inspector, D'Cruz, came to the spot at about 8 A.M. on the 5th November. In the evening of the same day the Railway Sub-inspector of Police of Sahebganj went to the spot, and after doing the needful brought the accused to Tildanga, where he was kept for the night. The Sub-inspector again went to

1913  
PULIN TANTI  
v.  
EMPEROR.

the spot the next morning with the accused. The Permanent Way Inspector, D'Cruz, also went to the spot that morning. On the 8th November the accused was sent by the police to the Subdivisional Magistrate for his confession to be recorded. There he made a long statement in which, after relating justificatory grounds, he admitted having throttled the woman, severed her head from the body and then placed the headless trunk on the railway line, to give the whole incident an appearance of suicide. At the enquiry, preparatory to commitment, the accused, when questioned, adhered to the statement made in his confession. At the trial in the Sessions Court the accused retracted the confession and alleged in his written statement that the confession had been induced by torture.

In this Court, emphasis on behalf of the appellant is laid on, (i) the confession not being recorded properly, (ii) its involuntary character, and (iii) the confession having been retracted the Judge ought not to have relied on it.

We see no substance in the first objection, as the only defect pointed out is that the Magistrate, instead of asking the accused about the voluntary nature of the confession at the commencement of the confessional statement, asked him at the end. That appears to us to be merely a defect of form that does not alter the character of the confession.

There is nothing on the record to support the second objection.

In respect of the third objection, we have to see if the material statements in the confession are supported by independent and corroborative evidence.

The defence is that the woman was run over by a train. This theory is obviously unsustainable, and the witnesses, including the doctor and the railway

men, are agreed that the woman was not run over by a railway train. We have carefully considered the evidence regarding this theory of the defence and have come to the conclusion that the woman was murdered. The assessors also have agreed with the learned Judge in his view that the woman came by her death as the result of a murder.

1913  
PULIN TANTI  
v.  
EMPEROR.

The theory of the woman being run over by a train having been disproved, and murder being established, the previous history of the relations between the deceased woman and the appellant has a very relevant bearing on the charge against him. His refusal to maintain her, her appealing to the villagers against his conduct, the holding of a pan-chayat, her having become pregnant, his mother's displeasure at the woman's presence in the house, the frequent quarrels and bickerings between the man and woman ending in his having struck her on the 5th November, a day before the body is discovered on the railway line, supply conjointly a sufficient motive for the murder.

The statement of the accused in the confession that he had borrowed a *hansua* from his neighbour, Mahadeo, for the purpose of cutting the woman's throat, is borne out by the testimony of Mahadeo, which affords an independent corroboration of a most material statement in the confession of the accused.

The Permanent Way Inspector, D Cruz, has deposed that on the morning of the 6th November, when he spoke to the accused, the latter told him that the woman had been unfaithful to him. It has to be borne in mind that up to that time the police had not arrived on the scene, and no one can suggest that some of the justificatory statements made subsequently in the confession were made by the accused to

1913  
PULIN TANTI  
v.  
EMPEROR.

D'Cruz under pressure. The learned counsel for the appellant has pointed out several statements in the confession that must be false, and, therefrom, he argues that the entire confession, including the admission of guilt, must also be false. We may point out that only such statements as embody the justification for the murder have been shown to be false, and it stands to reason that an accused person may well attempt to justify his act by setting out false reasons if the motive for his confession is not repentance of his sin. We are asked to hold that, parts of the confession having been found to be false, the entire confession should be rejected. This is too broad a proposition, to which we can not accede. After the entire statement of a prisoner has been given in evidence, any part of it may be contradicted by the prosecution if they choose to do so, and then the whole testimony is left open for consideration precisely as in other cases where one part of the evidence contradicts another. Even without such contradiction it is not supposed that all the parts of a confession are entitled to equal credit. If sufficient grounds exist the part that charges the prisoner may be believed, while that which is in his favour may be rejected: see *Rex v. Higgins* (1), *Rex v. Steptoe* (2), *Rex v. Clewes* (3).

We find that the case for the prosecution is strongly supported by circumstances and there is independent corroboration of some of the most material statements of the confession from the evidence of the prosecution. We believe that the confession was voluntarily made. The conviction of the appellant is upheld and the appeal is dismissed.

E. H. M.

*Appeal dismissed.*

(1) (1829) 3 C. & P. 603.

(2) (1830) 4 C. & P. 221.

(3) (1830) 4 C. & P. 397.

## PRIVY COUNCIL.

CHIMAN LAL

v.

HARI CHAND.

P.C.\*  
1913April 8, 15;  
May 2.

[ON APPEAL FROM THE CHIEF COURT OF THE PANJAB, AT LAHORE.]

*Adoption—Agarwal Banias of Zira, Panjab—Custom—Adopted person, an orphan and married—Adoption by declaration of adoption and subsequent treatment of adoptee as adopted son—Privy Council, practice of—Concurrent decisions on fact.*

In this case in which the plaintiff sued for a declaration of his adoption the parties were Agarwal Banias of Zira in the Panjab, and the plaintiff being an orphan and married, the validity of the adoption, if made, depended upon whether they were governed by custom or by the Hindu law. Their Lordships of the Judicial Committee considered that the Courts below had concurrently found that among the class to which the parties belonged the rules of Hindu law as to adoptions did not apply, and that by the custom applicable to that class an unequivocal declaration by the adopting father that a boy had been adopted, and the subsequent treatment of that boy as the adopted son, was sufficient to constitute a valid adoption; and that, in fact, the defendant had so adopted the plaintiff and treated him as his adopted son. In accordance, therefore, with the usual practice as to such concurrent decisions:—

*Held*, that the adoption had been established. Owing, however, to the limited nature of the evidence as to custom among the Agarwal Banias of Zira, the effect of the decision should be confined to the particular circumstances of the case.

APPEAL from a judgment and decree (6th April, 1908) of the Chief Court of the Panjab passed on review, which affirmed the judgment and decree (14th October, 1904) of the Divisional Judge of Ferozepore,

\* *Present*: LORD SHAW, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

1913  
CHIMAN LAL  
v.  
HARI CHAND.

which had affirmed the judgment and decree (23rd March, 1903) of the District Judge, Ferozepore.

The representative of the defendant was the appellant to His Majesty in Council.

This appeal arose out of a suit instituted by Hari Chand, the respondent, against one Jiwan Mal, the predecessor-in-title of the present appellant, Chiman Lal, for a declaratory decree that the plaintiff was the adopted son of Jiwan Mal. The parties were Agarwal Banias of Zira. The plaintiff in his plaint stated that his three elder brothers separated from the rest of the family about 1894. His uncle, Jiwan Mal, then adopted him, and caused an entry of the fact to be recorded in a "bahi" or book. Up to August, 1900, Jiwan Mal had treated him as a son, but subsequently, owing to a quarrel, he turned him out of the house and repudiated the adoption.

The defendant denied the adoption, and the issue was framed,—“Has the plaintiff been adopted by the defendant, and is he, as such, his heir?”

On this issue the District Judge, on 23rd March, 1903, held that the plaintiff had been adopted by the defendant, but made no decision as to the validity of the adoption.

On appeal the Divisional Judge remanded the case under section 566 of the Civil Procedure Code, 1882, for enquiry by another District Judge on the points raised by the following issues:—“(i) whether the parties are governed by Hindu law or custom? (ii) If by custom, whether the adoption, as alleged to have taken place, was valid under the custom among the Agarwal Banias of Zira, to which class the parties belong? (iii) Whether, if there were two adoptions by one man, either of them can be held to be valid?”

The last of these issues was framed with regard to the contention of the defendant Jiwan Mal that, while

he denied having adopted any one as a son and heir, he had extended the same treatment to Chiman Lal, the son of his brother Maya Mal, as he did to the plaintiff, the son of his brother Ghannu Mal, and if the Court found that such treatment amounted to an adoption, there would be a double adoption proved which would be invalid in law.

1913  
CHIMAN LAL  
v.  
HARI CHAND.

The District Judge, on the remand, finding the evidence produced by the parties insufficient, appointed a Commissioner to make a local enquiry on the above issues. The Commissioner, a Government officer (a Tahsildar), took a considerable amount of evidence, wrote a report giving his opinion—(i) that the Agarwals of Zira, including the parties to the suit were governed by Hindu law; (ii) that the plaintiff's allegation as to an adoption, and an entry thereof in a book was untrue; (iii) that Jiwan Mal treated his nephew Chiman Lal as he treated his nephew the plaintiff, but that he did not adopt either of them; and (iv) that among the Agarwals of Zira not a single case had occurred of an adoption of an orphan who was a married man. The District Judge forwarded the evidence taken by the Commissioner, with his report, to the Divisional Judge stating that he agreed substantially with the conclusions arrived at by the Commissioner.

The Divisional Judge after the remand made a decree upholding the order of the first District Judge, dated 23rd March, 1903, decreeing the plaintiff's claim for a declaration that the plaintiff was the adopted son and heir of the defendant Jiwan Mal. In effect, he held that the parties were governed by custom and not by Hindu Law, and that a custom had been proved which justified his finding. The Divisional Judge declined to consider the question of the treatment of Chiman Lal and the matters raised on remand



1913  
CHIMAN LAL.  
"v"  
HARI CHAND.

by the third issue, as they were not referred to in argument, and in any view the defendant denied he had adopted Chimman Lal.

The following was the material portion of his judgment:—

"The first point for determination was whether the parties were governed by Hindu Law. So far as the usual ceremonies are concerned it is evident that the parties follow the Hindu Law, but from the evidence produced by the parties it is proved beyond a shadow of doubt that, as far as adoption is concerned, the parties do not follow the Hindu Law, but are rather governed by custom. In all the cases quoted by the parties, in not a single instance adoption was made either under the Dattaka form or under the Kritrina form, but all the adoptions were made under the customary law of the Province, i.e., by declaration and the treatment of the boy as a son. Hence, I hold that the parties are governed in cases of adoption by customary law. Now the question is whether under the customary law there was a valid adoption of the plaintiff by the defendant. It is urged that, as there was no giving and taking, the adopted son being an orphan, the adoption was invalid. But in almost all the cases no ceremony of giving and taking was performed; and in some cases orphans were adopted. From the evidence produced in the case it also appears that the Agarwal Baniyas, who reside at Amritsar, purchase boys and adopt them. In these cases there can be no possibility of the ceremony of giving and taking being performed. It appears that among the parties' caste a mere declaration to the effect that a boy has been adopted and his subsequent treatment as a son is sufficient, for all intents and purposes, to make the adoption a valid one. The next question to be decided is whether the defendant adopted the plaintiff as his son in the manner prevalent among the Agarwal Biradari. Though the plaintiff's witnesses assert that an entry in the "bahi" was made, I am not prepared to believe it, as the "bahi" is not forthcoming, because the defendant's own witnesses admit that the defendant took the plaintiff into his house as his son and treated him as such. The fact that, until the rupture took place between the parties, the plaintiff had been living in defendant's house and taking his meals there and working in defendant's shop, and that his name appeared in the "ganesh" of the "bahis" as one of the members of the family, a fact proved most satisfactorily, is sufficient to prove the customary adoption of the plaintiff by the defendant. In addition to these, there are large numbers of powers-of-attorney in which defendant declares the plaintiff as his son. There is one more piece of evidence which leaves no doubt on the point. In 1899, the brothers of the plaintiff reported to the patwari that the land in the

village Machhian had by private partition fallen to their share, and that Jiwan Mal and Maya Mal had taken other land in exchange, and that as Hira or Hari Chand, plaintiff, had been adopted by Jiwan Mal as his son, he had given up all his rights in his natural father's property. This entry was attested by Jiwan Mal on 20th May, 1899 (*vide* copy of Mutation Register of Machhian for 1898-99 in the file). This entry proves that Jiwan Mal admitted that the plaintiff was his son and he cannot now deny the fact. For the above reasons, I hold that the plaintiff was adopted by the defendant, Jiwan Mal, as his son according to the custom prevailing among the Agarwal Banias of Zira."

1913  
CHIMAN LAL  
v.  
HARI CHAND.

From that decision the defendant appealed to the Chief Court. Although no regular appeal lay, the case was admitted under the special powers of revision conferred on the Court by section 70 (A) and (B) of the Panjab Courts Act (XVIII of 1884). On the case coming on for hearing the Court (JOHNSTONE and CHATTERJI JJ.) set aside the decree of the Divisional Judge, and made a decree (14th May, 1907) dismissing the suit on the ground that a "material irregularity" had been committed in excluding from consideration the alleged treatment of Chimam Lal by Jiwan Mal. The Chief Court came to the conclusion that that treatment had been similar to that accorded to the plaintiff, and that consequently the adoption was invalid both by law and custom.

An application by the plaintiff for a review of judgment was subsequently granted and a Divisional Bench of the Chief Court, consisting of the same Judges as before, eventually, on 6th April, 1908, reversed their former decree, and in lieu thereof directed that the decrees of the lower Courts declaring that the plaintiff was the adopted son of Jiwan Mal should be affirmed.

The material portion of their judgment was as follows:—

After referring to their former decision as to "material irregularity" and their holding that on

1913  
CHIMAN LAL  
v.  
HARI CHAND.

the evidence there was insufficient proof of differential treatment of Chiman Lal and the plaintiff to show positively that the latter was adopted and the former was not, the Chief Court said :—

“Having come to this conclusion we did not think it necessary to go into the question of custom *versus* Hindu law, as on our finding, under neither set of rules could plaintiff be an adopted son. In arriving at this conclusion, we unfortunately fell into certain errors in regard to what evidence there was on the file. We have now heard the whole case re-argued in the light of documents, and evidence which we overlooked last year, and we have arrived at the conclusion that the decisions of the Courts below were sound and should be upheld. We found in our former judgment that there was no formal declaration of adoption before the brotherhood—see clause (a) in section 35, Explanation I, Rattigan's Digest—and to this view we still adhere. We also held that there was no written declaration of the adoption—see clause (b)—and this also we adhere to. But clause (c) is the important one—a long course of treatment evidencing an unequivocal intention to appoint the specified person as heir. We do not propose to go into details here. In favour of plaintiff we have a large number of documents in which Jiwan Mal described him as his adopted son : we have not only the Machhian mutation (1899), as we formerly supposed, but we have also the mutations in many other villages, virtually telling the same tale. We now have direct oral evidence to rebut the oral evidence of the similar treatment of the two boys ; and we have various public records in which such officials as the Sub-Registrar and Tahsildar described plaintiff as adopted son of defendant, and it is noticeable that the Sub-Registrar notes that he is acquainted with plaintiff.”

After referring to the very long list of documents, powers-of-attorney and others, in which the plaintiff alone was called adopted son, and in most of which Chiman Lal was consistently called Jiwan Mal's nephew, the judgment of the Chief Court continued :—

“The learned Divisional Judge has held that defendant is estopped from denying his adoption of plaintiff. This finding has not been impugned in the petition before us. This may be because the Divisional Judge does not use the word ‘estoppel,’ but even if we allow the point to be urged, and even if we take the case apart from estoppel, it seems to us, viewing the facts in the complete form in which they are now before us, that there is ample evidence that defendant unequivocally designated plaintiff as his

heir. The most important point is that defendant in some instances actively brought it about, and in other cases concurred in bringing it about, that plaintiff wholly lost or gave up his right to share in his natural father's property. If this is not unequivocal treatment of plaintiff as his own son, we do not see what can be. Further, from 1894, and even before, plaintiff lived with his uncles and not his brothers. He began to live with them when his mother died, but had he not been adopted, at least in 1894, he would have thereafter lived with his own brothers. We may note here that the attempt to prove that in 1898 defendant turned plaintiff out and took him back fails, in view of defendant's own statement, see remand before Divisional Judge.

"The *factum* of adoption then, seems to us proved, and we turn to the question of its validity. Upon an examination of the evidence in the case we cannot hold that these Agarwals strictly follow Hindu law. Not only in other matters are they lax, but also in matters of adoption. It has been held over and over again that nowhere in the Panjab can it be said that religious rites are necessary to constitute a valid adoption, even among Hindus of non-agricultural classes. We need only refer to the very large number of rulings on the point, beginning with No. 37, Punjab Record, 1868, ending with No. 68, Punjab Record, 1904. These cases deal with Brahmins, Khattris of many *gots*, Bedis, Aroras, Kalas and so forth. The really important thing is the unequivocal intention and the treatment, and we hold both proved here."

The Chief Court granted a certificate that the case was a fit one for an appeal to His Majesty in Council. The substantial question of law which was necessary, as all the Courts had agreed in their decisions, was declared to be, "whether in matters of adoption the Agarwals of Zira were governed by Hindu law or by custom, 'which' the Chief Court said, was 'clearly one of importance'".

On this appeal,

*Sir R. Finlay, K.C.* and *Ross, K.C.*, for the appellant, contended that the parties were governed by Hindu law, and not by the customary law; and no valid adoption in accordance with Hindu law had been proved. The respondent was an orphan and was

1913

CHIMAN LAL  
v.  
HARI CHAND.

1913  
CHIMAN LAL  
v.  
HARI CHAND.

married, and could not be validly adopted under the Hindu law: *Rupchand v. Jambu Parshad* (1). The alleged adoption was invalid and inoperative also under the customary law, and no such custom as alleged had been proved by the respondent, upon whom lay the onus of establishing it. The mere treatment of the respondent as a son was not sufficient in law to establish his adoption, particularly in the absence of any proof that amongst the Agarwal Banias of Zira, to which class the parties belonged, that mode of adoption was followed as a family or tribal custom. Even if an adoption could be established by proof of a long course of treatment, the period of six years of such treatment, which was alleged, was insufficient to prove the adoption. Jiwan Mal was not estopped from denying the alleged adoption, and was entitled to repudiate it, as he did, during his life-time. It was also submitted that the Chief Court had acted irregularly in setting aside its decision of 14th May, 1907, and in coming later to a contrary conclusion. That Court should have dismissed the suit.

[SIR JOHN EDGE, referred to the judgments of the Divisional Judge; and of the Chief Court on review, and to the concurrent findings there expressed as to the fact of the adoption, and the custom as to adoption by which the Agarwal Banias were found to be governed.]

The rule as to concurrent findings was confined to cases in which the concurrence was on questions of pure fact. This was a mixed question of law and fact, the substantial question of law on which the certificate of fitness for appeal was granted was the question whether the parties to this suit were governed by Hindu law or by custom.

(1) (1910) I. L. R. 32 All. 247 : L. R. 37 I. A. 93.

[LORD SHAW, referred to *Sajjad Husain v. Wazir Ali Khan* (1).]

1913

CHIMAN LAL  
v.  
HARI CHAND.

Reference was made to *Karuppanan Servai v. Srinivasan Chetti* (2), where it was found there was no real question of law. In the present case there was, it was submitted, a question of law involved. Section 596 clause (c) of the Civil Procedure Code, 1882, was very wide as to the admission of appeals: sections 598 and 600 of the same Code were also referred to:

*De Gruyther K.C.* and *G. C. O'Gorman*, for the respondent, contended that there were concurrent findings of fact which were binding on the Board, irrespective of the certificate of appeal. All the Courts in India had concurrently found that the respondent was in fact adopted by Jiwan Mal. The findings of the Divisional Judge, that the parties in regard to adoption were governed by custom, as opposed to Hindu law, and that the adoption of the respondent by Jiwan Mal was in accordance with that custom, were findings of fact, and as such were final and conclusive and not open to appeal. Reference was made to *Rup Chand v. Jambu Parshad* (3).

[LORD SHAW, said that their Lordships were bound by Lord Macnaghten's decision in *Karuppanan Servai v. Srinivasan Chetti* (2).]

Ross replied.

The judgment of their Lordships was delivered by

SIR JOHN EDGE. The suit in which this appeal has arisen was brought on the 19th January, 1901, in the Court of the District Judge of Ferozepore by Hari Chand, who is the respondent here, against Jiwan Mal, now dead, who is represented by Chiman Lal, the

May 2.

(1) (1912) I. L. R. 34 All. 455, 463, (2) (1901) I. L. R. 25 Mad. 215 :

464 : L. R. 39 I. A. 156, 162. L. R. 29 I. A. 38.

(3) (1910) I. L. R. 32 All. 247 : L. R. 37 I. A. 93.

1913  
CHIMAN LAL  
v.  
HARI CHAND.

appellant. In this suit Hari Chand sought a declaration that he was the adopted son of Jiwan Mal, the then defendant. In his written statement Jiwan Mal alleged that he had never adopted Hari Chand.

Hari Chand and Jiwan Mal were Hindus, and Agarwal Banias, of Zira, in the Punjab. Hari Chand was one of the four sons of Ghannu Mal, who was a brother of Jiwan Mal. Chiman Lal, the appellant here, was a son of Maya Mal, who was another brother of Jiwan Mal. At the time of the alleged adoption Hari Chand was an orphan and was married. No issue was framed by the District Judge as to whether the parties were governed by Hindu law or by custom, or as to the validity of the adoption if it, in fact, were made. The District Judge held that in the Panjab—

“Non-agricultural Hindus do not, in matters of adoption, follow Hindu law, and there seems no reason to doubt that a declaration of adoption, together with treatment in accordance with the avowed intention, would be sufficient to establish the validity of an adoption, even though the position of the adopted son were inconsistent with the strict requirements of Hindu law.”

The District Judge found that Jiwan Mal had, in fact, adopted Hari Chand, and on the 23rd March, 1903, gave the plaintiff a decree.

From the decree of the District Judge, Jiwan Mal appealed to the Court of the Divisional Judge of Ferozepore. The Divisional Judge, on the 10th July, 1903, remanded the suit to the Court of the District Judge to give the parties the opportunity of proving or disproving the validity of the adoption. On the return to the order of remand the Divisional Judge found, as a fact, that the parties were governed in cases of adoption by customary law, and that in the caste to which the parties belonged “a mere declaration to the effect that a boy has been adopted and his subsequent treatment as a son is sufficient for all intents and purposes to make the adoption a valid

one", and further found on the evidence that Hari Chand had been adopted by Jiwan Mal as his son according to the custom prevailing among the Agarwal Banias of Zira. The Divisional Judge, by his decree of the 14th October, 1904, dismissed the appeal.

1913  
CHIMAN LAL  
v.  
HARI CHAND.

From the decree of the 14th October, 1904, of the Divisional Judge, Jiwan Mal appealed to the Chief Court of the Panjab. The learned Judges of the Chief Court on Appeal carefully reviewed the evidence in the case, and holding that Jiwan Mal had unequivocally designated Hari Chand as his heir, and had treated him as his adopted son, found that the *factum* of adoption was proved. On the question of the validity of the adoption, the learned Judges found that the Agarwal Banias of Zira did not follow Hindu law in matters of adoption, and observed that "the really important thing is the unequivocal intention and treatment, and we find both proved here". The Chief Court by its decree dismissed the appeal.

From the decree of the Chief Court of the Panjab dismissing the appeal to that Court this appeal has been brought. In this appeal it has been contended on behalf of the appellant, so far as is material, that Jiwan Mal did not in fact adopt Hari Chand as his son, and that the alleged adoption was invalid according to Hindu law. Their Lordships consider that the Chief Court and the Divisional Judge have concurrently found that among the Agarwal Banias of Zira the general rules of Hindu law as to adoptions do not apply, and that by the custom applicable to the Agarwal Banias of Zira an unequivocal declaration by the adopting father that a boy has been adopted, and the subsequent treatment of that boy as the adopted son, is sufficient to constitute a valid adoption; and that in fact Jiwan Mal did unequivocally adopt Hari Chand as his son and treated him as his adopted



1913  
CHIMAN LAL  
v.  
HARI CHAND.

son. Of the fact of the adoption and treatment there was ample evidence upon which the Judges of the Chief Court and the Divisional Judge could find as they did. The evidence upon which it was found that the Agarwal Banias of Zira do not in matters of adoption follow the general rules of Hindu law, and that by the custom applicable to them an unequivocal declaration of adoption, followed by subsequent treatment of the person as an adopted son, is sufficient to constitute a valid adoption, appears to their Lordships to have been somewhat limited, but their Lordships consider that, as between the parties to this suit and to this appeal, and those claiming through or under them, that evidence was sufficient to entitle the Chief Court and the Divisional Judge to find that the adoption was valid. Their Lordships, however, consider that the present case, owing to the limited nature of the evidence as to custom among the Agarwal Banias of Zira, would not be a satisfactory precedent if in any future instance among other parties fuller evidence regarding the alleged custom of the Agarwal Banias of Zira should be forthcoming. The contention that Chiman Lal had also been adopted by Jiwan Mal is not established by the evidence before this Board.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed and that the decree of the Chief Court of the Panjab should be affirmed. Chiman Lal, the appellant, must pay the costs of this appeal.

*Appeal dismissed.*

Solicitors for the appellant: *Hartcup & Davis.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.

**APPELLATE CRIMINAL.**

*Before Jenkins C.J. and Sharfuddin J.*

NAWAB HOWLADAR

*v.*

EMPEROR.\*

1913

May 23.

*Evidence—Evidence Act (I of 1872), s. 122—“ Representative in interest ”  
—Disclosure by wife of communications made by deceased husband  
during marriage.*

Where there is no “ representative in interest ” who can consent, under s. 122 of the Evidence Act, to the disclosure of communications made by a deceased husband to his wife during marriage, the wife should not be permitted, even if willing, to disclose such communications.

The widow of a deceased husband is not his “ representative in interest ” for the purpose of giving such consent.

THE four appellants and others were tried before the Additional Sessions Judge of Bakarganj, with the aid of Assessors, on charges under section 302 read with section 34 and section 460 of the Indian Penal Code, and the appellants were found guilty thereunder, and sentenced, under section 302 read with section 34, to death.

It was alleged by the prosecution that the murders had been committed by a party of persons consisting, among others, of the appellants and one Hamju. The latter a few days after the murder committed suicide, leaving a widow, Jaytun Bibi, and an infant daughter aged four years. It was also alleged by the prosecution that, prior to committing suicide, Hamju had made certain statements, implicating the appellants in the murders, to his wife Jaytun. The prosecution sought to prove these statements under section 32 (3) of

\* Criminal Appeal No. 329 of 1913, against the order of S. K. Ghose, Additional Sessions Judge of Bakarganj, dated March 25, 1913.

1913  
 NAWAB  
 HOWLADAR  
 v.  
 EMPEROR.

the Evidence Act, and examined Jaytun as a witness, who freely deposed to the statements made to her by Hamju. An objection was taken by the defence that these statements were inadmissible under section 122 of the Evidence Act. The Additional Sessions Judge, however, overruled the objection, and admitted the statements. On appeal, it was contended, *inter alia*, that the statements should not have been admitted in evidence.

*Mr. K. N. Chaudhuri* (with him *Mr. Surita* and *Babu Brojendra Nath Chatterjee*), for the appellants, submitted that the statements being communications made during marriage, the widow should not, under section 122 of the Evidence Act, have been permitted to disclose them, even if she was willing to do so.

*The Offg. Deputy Legal Remembrancer (Mr. C. E. Bagram)*, for the Crown. The evidence was properly admitted, inasmuch as the widow was a willing witness, and she is the deceased's representative in interest.

[JENKINS C.J. No, she is not. There is no representative in interest here.]

It is submitted that if there is no representative in interest, no question of consent can arise; and there being no one whose consent could be obtained, the statements are admissible, if the widow is a willing witness, without consent.

*Our. adv. vult.*

JENKINS C.J. The four appellants, Nawab Howladar, Zaban Ali, Abdul Malla and Araz Ali Sikdar, have been convicted under sections 302 and 460 of the Indian Penal Code, and sentenced to death under the former section. In convicting the accused the Sessions Judge agreed with both the Assessors.

From this conviction and sentence the present appeal has been preferred, and the proceedings have been submitted for confirmation of sentence.

Both sides of the case have been placed before us with care and skill by Mr. Chaudhuri for the defence and Mr. Bagram for the prosecution, and we have been much assisted by their arguments.

The story of the crime may be briefly told. On the night of Wednesday, 6th November last, two men, three women and a little girl were murdered at Rajar Char in the house of Osimuddi, one of the victims. They were the sole inmates of the house at the time, and so the crime was not discovered until the following morning.

There can be no doubt that it was the work of more than one culprit, and the case for the prosecution is that it was committed by a party of men of whom the present appellants were some. Plunder was apparently not the motive.

Of the appellants, two confessed before a Deputy Magistrate, but they subsequently retracted their confession. The prosecution seek also to rely on the statements ascribed to Hamju, an alleged member of the party, who has since died by his own hand.

Over and above this there is the medical evidence and the testimony of witnesses, who speak to the enmity of the appellant Nawab Howladar towards the murdered man Osimuddi, of witnesses who depose to having seen or heard some of the appellants that night in circumstances which, according to the prosecution theory, point to their presence in the neighbourhood of the crime, of the police officers who investigated the crime, and of an eye-witness, and so forth.

This eye-witness is an approver named Abdul Karim Sardar. His evidence is strongly attacked,

1913  
—  
NAWAB  
HOWLADAR  
v.  
EMPEROR.  
—  
JENKINS C.J

1913  
 NAWAB  
 HOWLADAR  
 v.  
 EMPEROR  
 JENKINS C.J.

and, apart from the criticism to which the evidence of all approvers is open, it is urged that the story of Abdul Karim is manifestly false.

I will first deal with statements attributed to Hamju by his widow Jaytun Bibi.

It was contended before the Sessions Judge, and the contention has been repeated here, that the widow's disclosure of these communications should not have been permitted by the Court. The Sessions Judge, however, overruled the objection on grounds which appear to me to be in complete disregard of the language of section 122 of the Evidence Act on which the defence relied.

The statement to which Jaytun deposed was a communication made to her during marriage by a person to whom she had been married. Not only, therefore, could she not be compelled to disclose that communication, but she should not have been permitted to disclose it, for there was no one who did or could consent to the disclosure. The prohibition enacted by the section rests on no technicality that can be waived at will, but is founded on a principle of high import which no Court is entitled to relax. Jaytun's disclosure, therefore, of Hamju's communications must be excluded from consideration.

[His Lordship then dealt with the rest of the evidence, and concluded :—]

As against Zaban Ali and Abdul Malla, the convictions and sentence must be reversed, and they must be acquitted and set at liberty. As against Nawab Howladar and Araz Ali Sikdar, the convictions must stand, and in each case we confirm the sentence of death.

SHARFUDDIN J. I agree.

C. E. B.

## APPELLATE CIVIL.

*Before Coxe and Ray JJ.*

RAMPRASANNA NANDI CHOWDHURI

v.

SECRETARY OF STATE FOR INDIA.\*

1913

May 23.

*Shebait—Alienation, power of—Dedicated property, acquisition of—Land Acquisition Act (I of 1894) s. 31 cl. (2)—Compensation-money. withdrawal of.*

The position of a *shebait* is analogous to that of the manager of an infant. He is entitled to possess and to manage the dedicated property, but he has no power of alienation in the general character of his rights.

S. 31 cl. (2) of the Land Acquisition Act applies to a *shebait* since he is not competent to alienate the land.

*Kamini Debi v. Promotho Nath Mookerjee* (1) followed.

APPEALS by Ramprasanna Nandi Chowdhuri and others, the claimants.

Certain land, belonging to the family idol of the claimants, was acquired by the Government under the Land Acquisition Act of 1894. The claimants, as *shebait*s, prayed for permission to withdraw the compensation-money awarded for the land. Their applications were rejected by the Special Land Acquisition Judge of the 24-Parganas. Against these orders the *shebait*s appealed to the High Court.

*Babu Ram Chandra Mozumdar* (with him *Babu Atul Chandra Dutt*), for the appellants, submitted that the whole question depended upon the inter-

\*Appeals from Original Decrees No. 178-180 of 1911, against the decrees of Arthur Goodeve, Special Land Acquisition Judge of Alipur, dated Dec. 1, 1911.

1913  
 ———  
 RAM-  
 PRASANNA  
 NANDI  
 CHOWDHURI  
 v.  
 SECRETARY  
 OF STATE  
 FOR INDIA.

pretation that was to be put on the words "no person competent to alienate the land" in s. 31, cl. (2) and the words "no power to alienate the same" in s. 32 of the Land Acquisition Act.

Are the *shebait*s competent to alienate the property or not? Here the property is dedicated to a family idol and it is well known that, so far as private property is concerned, the *shebait*s can change the character and give the estate another turn if they are so minded.

Section 32 of the Land Acquisition Act applies to a case where there is an absolute want of power to alienate the property.

There is a clear distinction made between *debuttur* property of a public and private character: *Konwar Doorga Nath Roy v. Ram Chunder Sen* (1); *Jagadindra Nath Roy v. Hemanta Kumari Debi* (2); *Abhiram Goswami v. Shyama Charan Nandi* (3).

In a *debuttur* of a private character no one outside the family circle is interested in the preservation of the *debuttur* property and therefore if the *shebait*s agree to give to it a different turn they are at liberty to do so: Mayne's Hindu Law s. 438. I must, however, point out that the case of *Kamini Debi v. Promotho Nath Mookerjee* (4), is against me. But there it is not clear that the endowment was not of a public character.

No one appeared for the respondent.

*Cur. adv. vult.*

RAY J. These are cases under the Land Acquisition Act, 1894. There has been an order under section 31 (2) of the Act for the deposit of the compensation money, and the claimants' applications

(1) (1876) I L. R. 2 Calc. 341, 347.

(3) (1909) I. L. R. 36 Calc. 1003.

(2) (1904) I. L. R. 32 Calc. 129.

(4) (1911) 13 C. L. J. 597

for payment were rejected. Against these orders there have been these three appeals. The lands acquired belonged to the family idol of the claimants, Sri Sri Raj Rajeswar. This is admitted, and it is also admitted that the claimants are only *shebait*s of the idol. It is settled law now that the position of the *shebait* is analogous to that of a manager of an infant. He is entitled to possess and manage the dedicated property. He has no power to alienate it in the general character of his rights. It appears to us that the Land Acquisition Judge rightly held that section 31 (2) applied to the case. This was also the view of Mookerjee and Carnduff JJ. in the case of *Kamini Debi v. Promotho Nath Mookerjee* (1) and we follow that decision. It was contended for the appellants that as the *shebait*s could join in giving the dedicated property a different turn, it would follow that when they have all agreed, they are entitled to withdraw the money. The simple answer is that they have not as yet done so: and it is an admitted fact that the *debuttur* has remained unaltered in its character. The question whether they are capable of giving the dedicated property a different turn as regards this particular endowment has not arisen. The appeals are dismissed.

COXE J. concurred.

S. K. B.

*Appeals dismissed.*

(1) (1911) 13 C. L. J. 597.

1913  
 ———  
 RAM-  
 PRASANNA  
 NANDI  
 CHOWDHURI  
 v.  
 SECRETARY  
 OF STATE  
 FOR INDIA  
 ———  
 RAY J.



## APPEAL FROM ORIGINAL CIVIL.

*Before Woodroffe, Coxe and D. Chatterjee JJ.*

1912

Aug. 17.

D. WESTON AND OTHERS

v.

PEARY MOHAN DASS.\*

*Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 19 and 23—Conspiracy to maliciously prosecute, suit for—Conspiracy as a cause of action—Evidence Act (I of 1872), ss. 3, 114 ill.(g), 125—Standard of proof—Claim of privilege, whether adverse inference can be drawn from—Disclosure of source of information by privileged person, duty of Court regarding—Presumption as to possession of article found in common room of joint family dwelling-house—Arrest and search—Professional conduct of Counsel—Counsel making charges of misconduct, powers of Court regarding—Counsel's instructions, no privilege as against Court—Professional Etiquette affecting Counsel—Bar Council, resolutions of—Counsel accepting retainer when likely to be witness—Counsel engaged in case, propriety of appearing as witness—Adverse inference where Counsel not called as witness—Inspection by Counsel of book produced by witness during cross examination—Reference to medical works by Court, without knowledge of parties—Tort.*

*Per* WOODROFFE AND COXE, JJ. On the question of the standard of proof: there is but one rule of evidence which in India applies to both civil and criminal trials, and that is contained in the definition of "proved" and "disproved" in s. 3 of the Evidence Act. The test in each case is, would a prudent man after considering the matters before him (which vary with each case) deem the fact in issue proved or disproved? The Court can never be bound by any rule but that which, coming from itself, dictates a conscientious and prudent exercise of its judgment.

There is a presumption against crime and misconduct, and the more heinous and improbable a crime is, the greater is the force of the evidence required to overcome such presumption.

The English rule in these matters does not, as such, apply in India.

*Jarat Kumari Dassi v. Bissessur Dutt* (1) explained,

\* Appeal from Original Civil, No. 61 of 1911, in Suit No. 5 of 1910.

(1) (1911) I. L. R. 39 Calc. 245,

Where a document is privileged from production, no adverse inference can be drawn from its non-production. This rule applies as regards the party claiming privilege, and *a fortiori* it applies where the privilege is claimed by a third party.

Although s. 125 of the Evidence Act does not in express terms prohibit a witness, if he be willing, from saying whence he got his information, the protection afforded by that section does not depend upon a claim of privilege being made, but it is the duty of the Court, apart from objection taken, to exclude such evidence.

*A fortiori*, where privilege is claimed, no adverse inference can be drawn therefrom.

Where articles are found in a part of a house to which several persons living in the house have access, such as a *boi akhana*, there is no presumption that they are in the possession or control of any person other than the *karta*, or head of the house.

*Queen Empress v. Sangam Lall* (1) approved.

*Semble* : It is immaterial, in an action for malicious arrest, under what section of an Act an arrest is made, if in fact the circumstances are such that the Act justified arrest ; and a person making a search is entitled to call in aid any statute which justifies his action, quite irrespective of whether it was present or not to his mind when he made the search.

The Court is entitled to ask counsel who, during the conduct of a case makes charges of misconduct, whether he makes the charges on instructions, and if so, on whose.

It is not sufficient to plead instructions. Counsel have a responsibility in the matter, and are not justified in making serious charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward.

Instructions to counsel are only privileged in the sense of being protected from disclosure to the opponent. There is no privilege as against the Court. The latter cannot use them as evidence in the case, and for the purpose of the trial would have to treat them as confidential, but they could be called for then and there and be used after the trial for determining whether disciplinary action should be taken against counsel by the Full Court.

Whenever a Court relies on a book of reference, such as a work on medical jurisprudence, it should be made known at the trial to the parties, so that they may have an opportunity of adducing evidence or argument on the point.

*Durga Prasad Singh v. Ram Doyal Chaudhuri* (2) followed.

(1) (1893) I. L. R. 15 All. 129.

(2) (1910) I. L. R. 38 Cal. 154.

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.

1912

WESTON  
AND OTHERS

v.

PEARY  
MOHAN DASS.

The following resolutions of the Bar Council approved :—

“(a) If counsel knows or has reason to believe that he will be an important witness in a case, he ought not to accept a retainer therein. (b) If he accepts a retainer not knowing or having reason to believe that he will be such a witness, but at the opening or at any subsequent stage before evidence is concluded it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear in the case unless he cannot retire without jeopardising the interests of his client. (c) If counsel knows or has reason to believe that his own professional conduct on matters out of which the action arises is likely to be impugned in the case, he ought not to accept a retainer. (d) If he accepts a retainer not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned, but finds in the course of the case that it is so impugned, he ought to adopt the same course of conduct as is mentioned in clause (b) *ante*. (e) In either of the cases mentioned in clauses (b) and (d), there is no rule of professional ethics which debars counsel, if he continues to act as counsel in the case, from going into the witness-box and being cross-examined.”

Although the resolutions of the Bar Council are not binding on the Courts, the Bar Council is the recognised authority on matters of professional conduct and etiquette affecting counsel, and its opinion is of the greatest weight and value.

There is nothing necessarily unprofessional in counsel giving evidence in a case in which he appears as such.

*Sethna v. Mirza Mahomed Shirazi* (1), *Cobbett v. Hudson* (2), *Stones v. Byron* (3), *Deane v. Packwood* (4), *Corea v. Peiris* (5), *Nundo Lal Bose v. Nistarini Dass* (6) referred to.

*Curry v. Walter* (7) distinguished.

As a general practice, however, it is undesirable when the matter to which counsel depose is other than formal, that they should testify either for or against the party whose case they are conducting.

Under s. 118 of the Evidence Act, counsel, although they may be engaged in the case, are competent to testify whether the facts in respect of which they give their evidence occur before or after their retainer.

*Cobbett v. Hudson* (2) referred to.

The rule laid down in s. 114 ill. (g) of the Evidence Act that the Court may presume that evidence which could be and is not produced would, if

- |                               |  |
|-------------------------------|--|
| (1) (1907) 9 Bom. L. R. 1044. | (4) (1847) 4 Dowl. & L. 395, n.        |
| (2) (1852) 1 E. & B. 11.      | (5) [1909] A. C. 549 ; 14 C. W. N. 86. |
| (3) (1846) 4 Dowl. & L. 393.  | (6) (1900) I. L. R. 27 Cal. 428.       |
| (7) (1796) 1 Esp. 456.        |  |

produced, be unfavourable to the party who withholds it, was he'd to apply to the case of counsel engaged in a suit who should not have been, under the circumstances, counsel but should have been called as a witness.

It is unprofessional for counsel to cross-examine a witness as to facts within his personal knowledge.

*In the matter of certain Counsel* (1) approved.

Where counsel during the hearing of a case calls for the production of a book, which is produced and handed to him by his opponent with certain pages marked as those only to which he may refer in respect of the subject-matter of his cross-examination, it is improper for counsel who calls for the book to inspect any of the other pages.

If a suit on a tort is barred as against one person, the period of limitation cannot be extended because it happens to be against three persons who are alleged to have committed the tort in conspiracy.

The same set of facts cannot constitute separate causes of action, both for a tort, and for a conspiracy to cause damage.

Where there is a joint tort, the proper action is on the tort against the joint tort-feasors, and not on a cause of action to recover special damage by reason of a conspiracy to cause damage.

A suit for damages for false imprisonment or malicious prosecution against joint tort-feasors, is governed by the one year rule under articles 19 and 23 of the Limitation Act.

There are instances in which two or more persons can render themselves liable to civil proceedings by combining to injure the plaintiff, although, if one of them did the same act by himself and without any pre-concert with others, he would escape liability. An action on such a conspiracy would lie in this country.

In an action on conspiracy, special damage must be proved.

*Per CHATTERJEE, J.* There is no authority for holding that a tort, when committed by several persons acting in concert, is different from the same tort committed by a single individual.

The combination in such cases may be an element of aggravation in the assessment of damages, but does not suffice to make it a different tort.

*Quinn v. Leatham* (2) referred to.

Conspiracy or wrongful combination is not a material element in the constitution of a wrong.

*Giblan v. National Amalgamated Labourers' Union* (3) referred to.

(1) 4th August 1908 (unreported.) (2) [1901] A. C. 495.

(3) [1903] 2 K. B. 600.

1912

WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.

APPEAL by the defendants, Donald Weston, Mazharul Huq and Lal Mohan Guha, from the judgment of Fletcher J.

This suit was originally instituted in the Court of the Second Subordinate Judge of Midnapore on the 15th November, 1909, and was transferred to the High Court, Calcutta, by an order of Fletcher J. dated the 13th June, 1910.

The plaintiff was a resident of Midnapore, and at the time of the transactions forming the subject matter of the suit the defendant Donald Weston was the District Magistrate of Midnapore, and the defendants Mazharul Huq and Lal Mohan Guha were, respectively, Deputy Superintendent of Police, and Inspector of Police, of Midnapore.

The suit was described in the plaint as being "valued at Rs. 10,000 on account of damages for wrongful confinement and malicious prosecution", and the material allegations in the plaint were as follows :—

1. That on the 8th of July, 1908, the defendants, acting in concert and conspiracy with each other, wrongfully and illegally caused a search to be made in the plaintiff's house at Midnapore, and the defendants Nos. 2 and 3 trespassed into the plaintiff's house and conducted such pretended search, and acting in concert with defendant No. 1 falsely and maliciously and without any reasonable and probable cause arrested the plaintiff's son Santosh Chandra Das and had him remanded in custody.

2. That on or about the 23rd of July, 1908, the defendants, acting in concert and conspiracy with each other, maliciously and wrongfully, and without any reasonable and probable cause, intending to hurt and injure the plaintiff in his good name, fame, reputation and character, and to cause him to be suspected of disloyalty to the Government as by law established in British India, and to bring him into great disgrace, and with a view to extort a false confession from his son the said Santosh Chandra Das, preferred a false charge against the plaintiff of an offence under Section 6 of the Indian Explosives Act (VI of 1908).

3. That in further pursuance of the said illegal design, and acting in concert and conspiracy as aforesaid, the defendants procured the Joint

Magistrate in charge of the Sudder Subdivision of Midnapore to grant a warrant for the apprehension and arrest of the plaintiff, and maliciously and without any reasonable and probable cause, arrested and caused the plaintiff to be arrested on the said 23rd of July, 1908.

4. That in furtherance of the said common intention, and acting in concert as aforesaid, the defendants maliciously, and without any reasonable and probable cause, caused the plaintiff to be illegally imprisoned and kept under imprisonment in a condemned cell in the Midnapore Central Jail from the said 23rd of July, 1908, to the 31st August, 1908, when the plaintiff was discharged.

5. That in further pursuance of the said common design and intention, and acting in concert with each other as aforesaid, the defendants commenced a prosecution against the plaintiff, and conducted the same falsely, maliciously, and without any reasonable and probable cause, until the 31st August, 1908, when the plaintiff was discharged and the said prosecution terminated.

6. The plaintiff charges that the defendants Nos. 2 and 3 trespassed into the plaintiff's house acting in concert and conspiracy with the defendant Donald Weston, and the defendants procured the arrest and imprisonment of the plaintiff, and caused him to be illtreated and put to a considerable indignity, and proceeded with the prosecution as aforesaid falsely, maliciously, and without any reasonable or probable cause.

7. That the arrest, imprisonment and prosecution of the plaintiff's son, the said Santosh Chandra Das, were also malicious and without any reasonable or probable cause, and he has since been acquitted by the Honourable High Court.

8. That in consequence of such arrest and imprisonment the plaintiff who is advanced in years, suffered greatly in health, and now he is completely ruined in health and almost blind.

9. That by reason of the premises the plaintiff has been injured in his reputation and character, and has suffered great pain of body and mind, and has incurred expenses in defending himself from the said false and malicious charges, and has otherwise suffered considerable loss and damage which he estimates at Rs. 10,000 in all.

10. That the cause of action arose on the 31st August, 1908, but the plaintiff is advised that no portion of his claim is barred by the law of limitation (the period of notice being excluded).

The defendants, in their written statements, after dealing with the allegations of fact made in the plaint, pleaded that the suit was barred by limitation.

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.

1912

WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.

The bomb in consequence of the finding of which the plaintiff was arrested was alleged to have been found in the *boitakhana* of the plaintiff's family dwelling house. In effecting the plaintiff's arrest the defendant Donald Weston purported to act under s. 5 of the Explosive Substances Act (VI of 1908). In his defence he sought to justify the arrest of the plaintiff, on grounds which, it was alleged on behalf of the plaintiff, referred to s. 6 of the same Act, though no mention of that section had been made in the written statement. It was argued for the plaintiff that the possession of the bomb could not be attributed to the plaintiff, and that in any case the defendant could not now seek to justify the arrest of the plaintiff under section 5, as he must be held to have pleaded that the plaintiff was arrested as an accessory under s. 6 of the Explosive Substances Act.

At the hearing before the Original Court objection was taken to senior counsel for the plaintiff having accepted a retainer in the case, and to his appearing as counsel, on grounds which are set out in the judgment of Woodroffe J., and his conduct in so doing was impugned as unprofessional. The objection, however, was not allowed.

During the hearing of the case one of the witnesses for the defence, Wilson, an Inspector of Armed Police, produced, at the request of junior counsel for the plaintiff, who was cross-examining him, a private pocket-book. Counsel for the defence before handing over the book, marked certain pages as those to which counsel for the plaintiff might refer in respect of the subject of his cross-examination. Counsel for the plaintiff, however, looked at some of the other pages of the book, and put questions to the witness based on the contents thereof. Objection was taken to this

by counsel for the defence, and was allowed. The point was, however, again raised on appeal.

Prior to the institution of the suit, Mr. D. J. Macpherson, then Commissioner of Burdwan, had, at the instance of the Government, in June 1909, enquired into and reported upon certain charges made against the police of Midnapore in respect of the alleged conspiracy. Mr. Macpherson was examined as a witness for the defence, and counsel for the plaintiff called for the production of this report. Government, however, claimed privilege from producing it. A similar privilege was claimed for certain confidential diaries of the defendants Mazharul Huq and Lal Mohan Guha. Both claims of privilege were allowed by the Court. The non-production of these documents was, however, permitted by the Court to be commented upon adversely by counsel for the plaintiff, and it was sought to draw an adverse inference therefrom.

During the hearing of the case counsel for the plaintiff charged the defendant Donald Weston and Mr. Hadrill, the solicitor instructing counsel for the defendants, with having conspired to fabricate false evidence, and to forge a certain document which was made an exhibit in the case. Counsel for the defendants applied to the Court to ask counsel for the plaintiff whether he made the charges on instructions, and if so, on whose. The Court, however, considered that it was not entitled to do so, and the application was refused.

After the hearing before the original Court was concluded, and before judgment was delivered, the learned Judge, unknown to the parties, referred to certain works on medical jurisprudence for the purpose of ascertaining whether a kick in the stomach could produce the effect which a certain witness stated it had produced on him. The learned Judge referred

1912

WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.



1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.

to this fact in his judgment, and objection was taken, on appeal, to this course having been adopted.

The suit was heard by Fletcher J., and after a hearing which lasted some eleven months, his Lordship, on the 7th August, 1911, passed judgment, awarding the plaintiff Rs. 1,000 as damages against the defendants.

The judgment of Fletcher J., so far as it is material to this report, was as follows :—

“This suit was instituted by the plaintiff on the 15th November 1909.

The substance of the plaintiff's case is that his arrest and the other events that followed thereon were done in furtherance of a conspiracy to injure or cause damage to him, and not in the *bona fide* belief, or with a reasonable suspicion, that the plaintiff was connected with the alleged Midnapore bomb conspiracy case or with the bomb found in his house. The object of the conspiracy is alleged to have been that unless the plaintiff induced his son Santosh to make a confession, the defendants would cause the plaintiff to be arrested. The plaintiff also alleges that in furtherance of such conspiracy he was arrested, and that damage has resulted as to him. This is the sum and substance of the plaintiff's cause of action as set out in the plaint.

The reasons set out in the written statements of the defendants, Weston and the Moulvi, for the arrest of the plaintiff is “of there being reasonable grounds for the belief that the plaintiff has been accessory to the commission of an offence under the Explosive Substances Act in connection with the said bomb which was found in his house.” This is the case in the pleadings which the defendants set up in reply to the plaintiff's case and upon this they came to trial.

The application for the warrant to arrest Peary on the 23rd July, 1908, (Exhibit R. in No. 1) states that “the surrounding circumstances of the conspiracy give rise to a reasonable suspicion that the accused Santosh Dass' father, Babu Peary Mohan Dass, who lives in the same house, and mingles with the accused, is fully aware of the operations and the possession of the bomb for an unlawful object.”

Now the case set up in the pleadings of the defendants Weston and the Moulvi that the plaintiff was arrested as there were reasonable grounds for the belief that the plaintiff had been accessory to the commission of an offence under the Explosive Substances Act in connection with the bomb

found in his house, has been wholly abandoned at the hearing and an attempt made to set up a wholly different defence to that raised in the pleadings.

The defendants are obviously not entitled to pursue such a course. The case the defendants are now endeavouring to set up is not that they arrested the plaintiff or caused him to be arrested on the ground that they reasonably believed him to be an accessory under Section 6 of the Explosive Substances Act, 1908, but that they arrested or caused him to be arrested under Section 5 of the same Act.

Section 5 of the Act is in the following terms :—

“ Any person who knowingly has in the possession or under his control any explosive substance under such circumstances as to give rise to a reasonable suspicion that he does not have it in his possession or under his control for a lawful object, shall, unless he can show that he had it in his possession or under his control for a lawful object, be punishable with transportation for a term which may extend to 14 years.”

The learned Advocate General stated that under this section whenever a bomb is found in a house every member of the family is liable to be arrested. That, in my opinion, is far too broad a statement. In this country the joint family system prevails and the family frequently consists of a very large number of persons. That every person in such family should, merely on the ground that a bomb is found in the joint family residence, be liable to be imprisoned and tried for an offence under the Explosive Substances Act, is not, in my opinion, the law. Section 5 of the Explosive Substances Act only applies when a person has in his possession or under his control an explosive substance. Though doubtless when once it is established that a person has in his possession or under his control an explosive substance, the statute casts the onus of proving that he had it in his possession or control for an innocent purpose on such person. But still one has to come back to the question when an article is found in the residence of a joint Hindu family, in whose possession or under whose control it is. If the article is found in a portion of the house of which one member of the family has the exclusive use then no difficulty arises, for such member must *prima facie* be held to be liable for anything that is found there. But if an article is found in a portion of the house of which all the members of the family have the use then *prima facie* the *karta* (the managing head) of the family is responsible.

But in either case it is only a presumption which may be rebutted, and if the Police act on information which they believe showing that an article found in a house is in the exclusive possession of one member of the family and the article is in fact found in a portion of the joint family residence which all the members of the family use, then I apprehend that the head of

1912

WESTON  
AND OTHERSv.  
PEARY  
MOHAN DASS.

1912

WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.

the family is not liable to arrest merely on the ground that the article is found in a portion of the house to which all the family can resort.

These seem to be the principles which are reasonably deducible from the decision of *Queen Empress v Sangam Lal* (1).

I have looked at certain works on medical jurisprudence in order to see if a kick in the stomach would produce the effect that Surendra has stated it produced on him. Apparently the shock to the nerve centre might produce the effect which Surendra has stated.

The evidence to my mind establishes conclusively that the three defendants were working together in concert for a common object. The motive of the defendant Weston for joining the conspiracy may be very different from that of the two other defendants. But the law does not permit of a man being arrested in order to put pressure on his son to confess, even if the person causing the arrests believes that by so doing he will get evidence that will lead to the conviction of persons engaged in a huge conspiracy.

I disbelieve altogether the suggestions of a corrupt motive that have been made against the defendant Weston.

I must now deal shortly with the points of law that have been raised by counsel. First it is said that the standard of proof in a case like the present is the same as if the defendants were being tried for a criminal offence. Doubtless the English text-book writers are not agreed on this point. Such eminent writers as Taylor and Stephen support the view that the standard of proof is, in a case like the present, such as would be required in a criminal case. The tendency, however, of the authorities in England appears to me to be the other way.

However, in India the law of evidence is codified. The Act defines when a fact is said to be proved, although, of course, in a case like the present, due regard must be had to the presumption of innocence. This matter is however, not open to argument in this Court. The point has recently been decided by Jenkins C. J. and Woodroffe J. in *Jarat Kumari Dassi v. Bissessur Dutt* (2) where they decided that whatever may be the rule in England, there is no rule under the Indian Evidence Act that the standard of proof in a case like the present must be the same as if the defendants were being tried on a criminal charge.

The next point argued is that a suit to recover damages resulting from a conspiracy is not maintainable in British India. The argument is put in

(1) (1893) I. L. R. 15 All. 129.

(2) (1911) I. L. R. 39 Calc. 245.

this way. That as the only conspiracy which constitutes a criminal offence under the Indian Penal Code is that of a conspiracy to wage war against the King, therefore no suit can be maintained for damages resulting from a conspiracy. To that argument I am unable to assent. This being a case instituted in a Court in the Mofussil, the Court has to apply the principles of justice, equity and good conscience to the case—that is to say, the principles of the law of England, so far as suited to India and the state of society here.

That the Indian Penal Code took away by express words any civil remedy cannot be suggested, nor can I see that it did so by necessary implication. I have therefore to consider the case apart from the provisions of the Indian Penal Code. On what principle of justice, equity or good conscience ought a plaintiff in a suit in a Court in India not to be entitled to recover damages which have resulted from a conspiracy to injure him. In my opinion, in such a case the plaintiff has a right of suit in India.

To hold otherwise would, I think, be a blot upon our system of jurisprudence.

The learned Advocate-General has referred, as part of his argument, to a memorandum by Lord Dunedin and Sir Arthur Cohen annexed to a report of the Commission on Trade Disputes, expressing the view that it was only such conspiracies as amount to a criminal offence that can give rise to civil liability. But the report obviously refers to conspiracies which are indictable according to the Common Law of England. Lord Macnaghten in his judgment in *Quinn v. Leathem* (1) expressly lays down that because a statute has exempted certain conspiracies from the purview of the criminal law, this does not in any way affect civil liability. Nor are Judges of the highest eminence all agreed that it is only such conspiracies as are indictable that can give rise to civil liability.

The next point raised by the Advocate-General is that the plaintiff has brought his suit on a conspiracy, and he must be kept strictly to the cause of action that he has set out in his plaint. To that view I assent.

But then, argues the learned Advocate-General, this suit is in substance only one for malicious prosecution against joint tort-feasors, and therefore the plaintiff's suit must fail. To that view I cannot agree.

I take the following from Lord Coke's Commentary on Littleton—Hargrave and Butler's Edition, published in 1794—a book of the highest authority amongst English lawyers. Note on 161a.

“II. Where two or more conspire to harass any person by a false and malicious suit, whether criminally or civilly, it is a crime punishable by indictment, or the parties injured may sue for damages by writ of conspiracy; and

1912

WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.

1912

WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.

both of these remedies lie at Common Law ; that part of the Statute or Ordinance, *Articuli super Chartas*, which gives remedy against conspirators by writ out of Chancery being, according to both Staunford and Lord Coke, only an affirmance of the Common Law. Staundf. P. C. 172, 2 Inst. 561, 562."

"IV. There is also a remedy for a false and malicious prosecution, though the aggravation of a conspiracy or confederacy is wanting and the injury comes from one only ; for in such a case the party prosecuted may have an action upon the case for damages."

A conspiracy to maliciously prosecute a man is obviously indictable according to the Common Law of England.

As Lord Brampton pointed out in the case of *Quinn v. Leathem* (1) :—  
"A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object, not in itself unlawful, by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved. This is the substance of the decision in *Barber v. Lesiter* (2)."

Applying the test given by Lord Brampton it is clear that if the conspiracy is a criminal one it gives rise to civil liability if special damage has been suffered by the plaintiff. The conspiracy in the present case would obviously be indictable at Common Law in England, and therefore, if damage resulted, the plaintiff would have a good cause of action in England. In my opinion, he has a similar right in India. The truth of the matter is that in a case like the present the plaintiff has two causes of action, one to recover the damage that has been occasioned to him as the result of the conspiracy, and the other to recover damages for malicious prosecution against the defendants as joint tortfeasors. This is well illustrated by the case of *Quinn v. Leathem* (1). There the plaintiff in his pleadings charged in the first four counts as separate causes of action four separate acts, each of which was alleged to have been done wrongfully and maliciously and with intent to injure the plaintiff, and to have occasioned him actual loss, injury and damage. The fifth count charged, as a separate cause of action, that the defendants unlawfully and maliciously conspired together, and with others, to do the various acts complained of in the previous counts, with intent to injure the

plaintiff and his trade and business, and that by reason of the conspiracy he was injured and damaged in his trade. The jury returned a verdict in favour of the plaintiff on all five counts and the verdict and judgment were upheld on appeal in the House of Lords.

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.

In my opinion the present suit to recover damages resulting from the conspiracy is maintainable by the plaintiff. These points of law, as to whether a suit to recover damages resulting from a conspiracy, and as to the nature of the present suit, do not in any way affect the merits of the suit. Their importance lies in the fact that if the suit is only one for malicious prosecution, then the suit is barred under the provisions of the Indian Limitation Act as being brought after the statutory period has expired.

The fifth issue is whether this suit is barred by limitation.

The article of the Indian Limitation Act 1908 which applies to the present suit is, I think, Article 36. This suit is, I think, a suit "for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for."—the period of limitation for such a suit is two years from the time when the malfeasance, misfeasance or non-feasance takes place. In this view the plaintiff's suit is brought within time. I do not agree with the argument that this suit is governed by Article 23, as being a suit "for compensation for a malicious prosecution."—the period of limitation for which is one year from the time when the plaintiff is acquitted, or the prosecution is otherwise terminated.

If this suit is not governed by Article 36 I should hold that Article 120 applies. That article fixes six years as the period of limitation with regard to suits for which no period of limitation is provided elsewhere in the second Schedule to the Act.

I am therefore of opinion that the present suit is not barred by limitation.

I accordingly award to the plaintiff the sum of Rs. 1,000 as damages. The defendants must pay to the plaintiff his costs of this suit on scale No. 2.

Before parting with this case I wish to make a brief reference to a matter, which, though not bearing directly on the result, is very intimately connected with the conduct of this case, and involves a serious imputation of unprofessional conduct, which two senior members of the Bar—one of them being the Advocate-General—have seen fit to make on the conduct of counsel opposed to them.

It was made a matter of deliberate and unrestrained attack on Mr. Dutt that he had not gone into the witness-box. Mr. Dutt has himself explained

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.

the reason of his abstention, and that reason appears to me to be satisfactory. His client in whose favour his testimony would have been given, with full knowledge of this, saw fit to retain him as his counsel, and it cannot be suggested that there was anything improper in Mr. Dutt's accepting this retainer. Having done this, it was in strict accordance with the rule of professional ethics of almost universal application, that, having taken up the position of an advocate, he should refrain from testifying on a trial which was being conducted by him. I may observe that this rule of professional conduct was not, I regret to say, observed by Mr. Dutt's opponents. I may further add that I viewed at the time, and still view, with complete disapproval, Mr. Norton's unfounded and abusive attack on Mr. Dutt's junior, Mr. H. D. Bose."

From this judgment the defendants appealed.

*Mr. Garth* (with him *Mr. Dunne, Mr. Eardley Norton, Mr. W. Gregory* and *Mr. A. Sharfuddin*), for the appellants. Whether the suit is for false imprisonment, or for malicious prosecution or malicious arrest, it is equally barred. As regards conspiracy it is submitted that it cannot constitute a cause of action here, and that the proposition that where a tort is committed by two or more persons in conspiracy, the person injured has an option of two causes of action, one generally on a conspiracy to injure, and the other on the particular tort, is wrong. If that were not so, there would be no such thing as a joint tort. Where a tort is committed, whether in pursuance of a conspiracy or otherwise, the article of the Limitation Act which applies is the article which deals with that particular tort. The case of *Quinn v. Leatham* (1) is distinguishable. There it was held that there is a cause of action against the persons doing a wrongful act jointly, where, if one person did that thing, there would be no tort at all; and the point in that case was that there was no particular tort known to the law within which the wrongful acts

(1) [1901] A. C. 495.

alleged came. Here there is such a tort, whether it be malicious arrest, confinement or imprisonment. Where the conspiracy has crystallized into a tort and the overt act done under it is in itself a tort, the legislature intended the same period of limitation to apply, whether it was done by one person or several persons.

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.

As regards malicious trespass, even if this can be said to be made one of the causes of action, it is necessary to prove damage resulting from the trespass. Here no damage at all has been proved, and certainly none from the trespass, and as regards the question of illegal search, it is clear that the search was perfectly legal unless the bomb was put in the plaintiff's house by the police, and it has been found that it was not.

*Mr. K. B. Dutt* and *Mr. H. D. Bose*, for the respondent. Where an act, if done by one person, does not constitute a tort, if it is done by a combination of persons, an action for conspiracy will lie. That is the law as enunciated in *Quinn v. Leathern* (1). There is nothing in any of the cases to show that where an act of one person amounts to a tort, if it is done by two or more it does not entitle the plaintiff to bring an action for conspiracy. Where the act of one person is not *injuria*, if there is *damnum* and it is done by more than one person, it is *injuria*. Where a wrongful act is done by two or more persons in conspiracy, the person injured has an option of more than one remedy, he can bring a suit on conspiracy or he can proceed against joint tort-feasors under one of the well-known heads of tort, conspiracy being another head of tort. The difference between malicious prosecution and a conspiracy to maliciously prosecute is that in the former case

(1) [1901] A. C. 495.



1912  
 ———  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.

the plaintiff has to prove damage, whereas in the latter he must prove special damage. Conspiracy is the combination of two or more persons to injure, the injury being caused by trespass, malicious prosecution or any other head of tort. If a person is being maliciously prosecuted by two or more persons in conspiracy, he can bring a suit for conspiracy while the prosecution is going on, whereas he must wait till he is acquitted before he can sue for malicious prosecution. In the former case he need not show that he has been acquitted, it is enough if he can prove conspiracy to injure. Or, if a plaintiff can prove that two or more persons have conspired to maliciously prosecute him, he can bring a suit for conspiracy before any prosecution has begun. Where an act which, if done by an individual amounts to a wrong, is done by a combination of two or more persons, a writ of conspiracy would lie, and a suit could therefore be brought in respect of it.

*Mr. Dunne*, in reply. The suit as framed is a suit for malicious prosecution. The plaint itself states that the suit was "valued at Rs. 10,000 for damages for wrongful confinement and malicious prosecution." Even if this is not so, a suit for conspiracy cannot lie. If three persons are sued for having maliciously prosecuted another in concert and conspiracy, and the plaintiff fails to prove the concert and conspiracy but can prove malicious prosecution against one, he is entitled to a decree, because it is a tort for which one person is liable and it is independent of conspiracy.

If such a suit was based solely and wholly on conspiracy, he could not get damages against one only. The conspiracy in such a case means no more than the actual tort of malicious prosecution. The conspiracy merely means the concert between the three which evidences their intention, but there is no use of

discussing intention if the actual tort is committed. Therefore if you have a right of suit against each person for a tort, but you claim damages against three because all have committed it, the suit is not based on conspiracy, and you are not dependent on it, and can get a decree against one. You have to depend on the combination of two or more persons to do a wrongful act only where the act, if done by one person, is not a tort. Furthermore, in a suit based on conspiracy, it must be shown that there is damage which has flowed from the conspiracy. In a suit based on conspiracy to maliciously prosecute where, as is alleged in this case, the malicious prosecution has in fact taken place, and damage has resulted, the damage has not flowed from the conspiracy, but from the malicious prosecution. That, in effect, is the case of *Barber v. Lesiter* (1).

1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.

If three persons conspire to maliciously prosecute a man and then do not prosecute him, he has no cause of action because no damage has flowed from the conspiracy; if on the other hand they do prosecute him, his cause of action is for the specific tort.

Where the Limitation Act has an appropriate article for the particular tort sued on, that article applies and the plaintiff cannot seek to come within any other article.

With regard to the argument that where two or more persons have conspired to maliciously prosecute a man, the latter may bring a suit for conspiracy before the prosecution is begun or while it is going on, it seems somewhat strange to think that a person might get a lakh of rupees damages for a conspiracy to maliciously prosecute him, say, for murder, one day, and be found guilty the next day, and then be hanged.

*Cur. adv. vult.*

1912

WESTON  
AND OTHERS

v.

PEARY  
MOHAN DASS.

The judgments of the Court, so far as they are material to this report, were as follows:—

WOODROFFE J. Before passing to the evidence I will deal with the question of the standard of proof required of the plaintiff in a case such as this, to which both the judgment and the argument have referred. The learned Judge has cited in support of his views in this matter the case of *Jarat Kumari Dassi v. Bissessur Dutt* (1), which was heard by the Chief Justice and myself. I wish to point out that the observations to which Mr. Justice Fletcher refers are to be found in the judgment of the Chief Justice, and that the separate judgment which I then delivered contains the grounds on which I disposed of that appeal.

In my opinion there is but one rule of evidence which in India applies to both civil and criminal trials, and that is contained in the definition of the terms “proved” and “disproved” in section 3 of the Evidence Act. This Act, to use the language of the Chief Justice in the case cited, “in conformity with the general tendency of the day, adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof.” The test in each case is, would a prudent man after considering the matters before him (which vary with each case) deem the fact in issue to be proved or disproved? In a matter of this kind the conscience of the Court can never be bound by any rule, but that which coming from itself dictates a conscientious and prudent exercise of its judgment. And speaking for myself where, whatever be the form of the proceeding, charges of a fraudulent or criminal character are made against a party thereto, it is right to insist that such charges be proved clearly and beyond reasonable doubt, though

(1) (1911) I. L. R. 39 Cal. 245, 255.

the nature and extent of such proof must necessarily vary according to the circumstances of each case. There is a presumption against crime and misconduct, and the more heinous and improbable a crime is, the greater of necessity is the force of the evidence required to overcome such presumption. I cannot myself imagine a Court saying to a party, who, as in this case, may be a person holding a high and responsible position, with a previous unblemished record: "It is true that I have reasonable doubts whether you did the grossly criminal acts with which you are charged, but I find that you did so all the same." And this exclusion of reasonable doubt is all that the so-called "criminal proof" requires. What I understand the Chief Justice to have held, and with this part of his judgment I agree, is, that the English rule in these matters (whatever it be, for authorities are not at one) does not, as such, apply to India. He proceeded, however, to say that the presumption against misconduct is not (as I have also said) without its due weight, though (he adds) the standard of proof, to the exclusion of all reasonable doubt required in a criminal case, *may* not be applicable. That is not that it is *not* applicable, but it possibly *may* not be. For this, two English cases are cited. Apart from the fact that the English authorities are not uniform on the subject, in my opinion the reasons which exclude the application of the English rule (whatever it may be) in this country, also exclude as authorities the cases which are said to embody and interpret it. Whatever, however, be the standard of proof applicable, and assuming it to be as the learned Judge puts it, the plaintiff has in my opinion, for the reasons which I give in my review of the facts to which I now proceed, failed to satisfy it.

1912

WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.  
WOODROFFE  
J.

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.  
WOODROFFE  
J.

After the decision of this Court in the criminal appeal, the Government deputed the Commissioner of Burdwan, Mr. D. J. Macpherson, to inquire into and report upon the charges made against the police in respect of the alleged conspiracy. This was done on the 10th June, 1909, and on following days. Mr. Macpherson, who has been called in this case, took the evidence of witnesses in the presence of Mr. K. B. Dutt, who was implicated by the informers' reports and who is said to have been the chief complainant and spokesman for the others. Some of the statements of the witnesses in that enquiry have been put in and used, and the witnesses for the plaintiff have been considerably cross-examined as to important discrepancies between these two statements then and now made. Learned counsel for the respondent has rightly objected to the admission of any statement which is not relevant to evidence actually given at the trial. The depositions at the enquiry are only admissible either to corroborate or contradict evidence given here. Mr. Macpherson then made a report, and a question arose about its production. I cannot see myself how a finding on a departmental inquiry or Mr. Macpherson's opinion in the matter could under any circumstances be evidence before us. But in any case the Government claim, as it was entitled to do, privilege. We have been told that in the House of Commons the Secretary of State declared that it was not advisable that the report should be published during the pendency of these proceedings. A similar privilege was claimed for a confidential diary of the Maulvi. Mr. Justice Fletcher allowed both claims of privilege. A suggestion was, however, made in cross-examination on behalf of the plaintiff that the Government claimed this privilege because it knew that the documents would, if produced, falsify the defence and

that it did not, to use counsel's word, "dare", therefore, to produce them. The question in which this unfounded suggestion that Government was assisting a case known by it to be false was made was a scandalous one and was very rightly disallowed by Mr. Justice Fletcher. The supposition is not to be tolerated that the Government of this country, one of whose functions is to administer justice through the very Court in which this accusation was made, was itself party to a conspiracy to defeat the just claims of the plaintiff by wrongfully withholding that which, if produced, would establish the falsity of a defence of its officers which they had further aided by public money. The suggestion serves, however, as a leading sample of the reckless and unfounded charges which have been made throughout this case.

On this point of privilege another matter must be noted; when a document is in fact privileged no adverse inference can be drawn from its non-production, for to allow this would be in fact to destroy the privilege. This rule applies as regards the party claiming privilege. *A fortiori*, where, as here, privilege is claimed by a third person, no adverse inference can be drawn against any party to the suit in consequence of such claim and allowance of privilege. The learned Judge, however, when dealing with the evidence, notes that the confidential diary was not produced, with the apparent object of drawing an adverse inference therefrom. If further the suggestion was that the confidential diary had been kept back the appellants have rightly contended that such an inference was prejudicial to them. The defendants do not represent the Government, though being its officers the costs of their defence are, I understand, borne by it. They are sued personally for their own alleged personal wrongs. Had they been the parties claiming

1912

WESTON  
AND OTHERSv.  
PEARY  
MOHAN DASS.WOODROFFE  
J.

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.  
WOODROFFE  
J.

and allowed privilege, no adverse inference could be drawn against them. But they are not. They in fact complain that the decision of the Government not to produce these documents has hampered them in their defence. In particular it is claimed that the production of the Maulvi's confidential diary would have helped to establish, as I think it might, the authenticity of the informer's reports which have been challenged. The learned Judge further allowed the claim of privilege for which the Evidence Act, section 125, provides, but has yet in several instances drawn inferences adverse to the police defendants by reason of the non-disclosure by them of the source of their information, the subject of the privilege. The learned Judge's comments were, in my opinion, not open to him. It must be of course first determined whether there is a privilege or not. But it is obvious that after the Court has once held that a document or subject-matter of enquiry is privileged, with the result that the other party cannot compel production or answer, the comment is not then open to the Court that the party to whom privilege has been allowed has not done or said that which the law and the Court have said he cannot be compelled to do or to say. I will only add as regards section 125 of the Evidence Act that though the section does not in express terms prohibit the witness, if he be willing, from saying whence he got his information, both the English authorities from which the rule is taken and a consideration of the foundation of the rule show that the protection should not be made to depend upon a claim of privilege being put forward, but that it is a duty of the Judge apart from objection taken to exclude the evidence. *A fortiori* if objection is taken, it cannot, since the law allows it, be made the ground of adverse inferences against the witness.

1912

WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.  
WOODROFFE  
J.

The learned Judge, in dealing with the evidence of the witnesses for the defence, in more than one place says that it is a matter of comment how Lal Mohan was able to discover them. The law, however, for the purposes of the administration of justice provides that a police officer shall not be compelled to say whence he got any information as to the commission of an offence (Evidence Act, section 125). The protection does not depend upon a claim being made, and it is the duty of the Court, apart from objection taken, to exclude such evidence. Here, moreover, the witness claimed and was allowed privilege. This being so, it was not in my opinion open to the Court which allowed the privilege, to draw inferences adverse to the case which the witness was called to support because that did not appear on the witnesses' evidence which the law had protected from disclosure.

I next pass to the arrest of the plaintiff. The first question which arises is whether Mr. Weston was in law justified in effecting that arrest. Section 5 of the Explosive Substances Act (VI of 1908) enacts that a person who knowingly has in his possession or control an explosive substance under such circumstances as to give rise to a reasonable suspicion that he does not have it in his possession or under his control for a lawful object, is punishable unless he shows that he had it in his possession or control for a lawful object. Therefore, once it is established that a person has under such circumstances in his possession or under his control an explosive substance, the statute casts the onus on him of proving that he had it in his possession or control for an innocent purpose. Section 6 of the same Act deals with abettors. Any person who by money, provision of premises, supply



1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 ———  
 WOODROFFE  
 J.

of materials or in any other manner abets or is accessory to the commission of any offence under the Act, is punishable in the same way as if he had committed the offence itself.

The first question then is whether the bomb must be taken to have been in the plaintiff's possession or control. The bomb was not found in any place in the separate and exclusive possession of any other person than the plaintiff. It was found in the *boitakhana*, a common room in possession of the family, by whom it was used and to which they all had access. As pointed out in *Queen-Empress v. Sangam Lall* (1) where articles are found in a house in such a place or places as several persons living in the house may have access to, there is no presumption as to possession and control that those articles are in the possession or control of any other person than the *karta* or house-master (in this case the plaintiff). This case was followed in the criminal appeal of Santosh against his conviction to this Court. There the Chief Justice said: "Had the bomb been found in Santosh's room when the search was made there, this might have been fair ground for imputing to him possession or control within the meaning of the Act. But the discovery in the *boitakhana*, a place equally open to others, taken by itself points no more to possession or control in Santosh than in the others who had equal access with him to this place." The judgment in appeal also holds that in such a case the *karta* or managing head of the family is *prima facie* responsible. But in this case the learned Judge holds that he was not, and as the Appeal Court held that the discovery of the bomb in the *boitakhana* did not indicate an exclusive possession by Santosh, it follows according to the judgment that the bomb must be deemed to have been

in the possession of nobody, and nobody was liable to account for it. But if the bomb was there, it was obvious that someone was accountable for it. The grounds for this conclusion are that the police, having acted on information showing that the article was in the exclusive possession of Santosh, they were not entitled to arrest the plaintiff merely on the ground that the bomb was in fact found in a public room in the house of which he was the owner. The answer, however, in the first place is that this does not correctly represent the information which the police had. The reports, it is true, do not mention the plaintiff and show that it was Santosh who took the bomb to the house. The reports do not state that the plaintiff had no responsibility, nor do they, nor could they, state that after the bomb was taken by Santosh to the house it remained in his exclusive possession. They deal with the movement of the bomb only during the period antecedent to that act. What they say is that the bomb was taken by Santosh to the *boitakhana*, a room which is a public room, where it was found. And for a finding in such room the owner of the house was responsible. It is quite possible that information may show that an explosive substance is taken to a house by a particular person, and that when it gets there another person may also become liable for its possession. The bomb having been found in what is by law the plaintiff's possession, the latter was called upon to account for such possession, though information showed that before it came into his possession it was in the possession of someone else, namely, his son, who was also the means by which it came there. It may well be that a person may take a bomb to the house of another and ask the latter to keep it for him, and the latter may do so or permit it to be kept in a place which the law deems to be his

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.  
WOODROFFE  
J.

1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 WOODROFFE  
 J.

custody. In short, the finding of the bomb in the possession or control of another justifies his arrest.

The learned Judge, however, next holds that the arrest was not justified as the pleadings show that the defendants did not arrest the plaintiff as the owner of the house under section 5, but as an accessory under section 6, of the Explosive Substances Act. He is of opinion that a different defence has been set up to that raised in the pleadings. Had this been so, I should have been ill-disposed to shut the defendants out on a merely technical plea, seeing it in no way affected the evidence which the plaintiff had given or might give, and that the plaintiff has shifted his own case from that stated in the plaint throughout the whole trial. In my opinion, however, the learned Judge's finding is not justified.

In the first place it is, in my opinion, immaterial in this case under what section of the Act the arrest was made, if, in fact, the circumstances were such that the Act justified arrest. If a person were arrested, say, on a charge of theft, but it turned out that he should have been arrested for criminal misappropriation, it seems to me, apart from any question of surprise and the necessity for calling any particular evidence, to be hardly possible or sensible that he could bring a suit for malicious arrest, claiming Rs. 10,000 or other damages saying: "it is quite true you could have arrested me for criminal misappropriation, but as you did not and pursued me for theft, I want my damages, because, though liable in fact to arrest, the warrant was issued under the wrong section." Such a conclusion, would, it appears to me, stultify the law. I may cite in this connection the observations of Mr. Justice Harington in *Clarke v. Brojendra Kishore Roy Chowdhury* (1) the appeal in which has recently been

decreed by the Privy Council: "In the course of the argument there was some discussion as to which of these Acts the defendant purported to act under; that to my mind is of very little importance; the defendant is entitled to call in aid any statute which justifies his action quite irrespective of whether it was present or not to his mind, when he made the search." The present case is not even one of different Acts, but of different sections under the same Act. It is, however, unnecessary to decide this question in the present suit as the learned Judge is in error in supposing that the warrant was under section 6 and not under section 5.

1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 WOODROFFE  
 J

The learned Judge, however, gave effect to this belated argument and has held that notwithstanding the application for arrest, warrant, and proceedings were under sections 4 and 5; that the plaintiff himself stated and understood that he was being proceeded against under sections 4 and 5, and that his counsel at the trial proceeded on the same basis—the defendants were not entitled to say that they acted under sections 4 and 5, because they are held to have pleaded (apparently in ignorance of the plain facts), that the plaintiff was arrested as an accessory under section 6. There is no mention of that section in the written statement, but the learned Judge reads the reference to accessory as implying action under that section. The word accessory is, however, there used not with reference to the warrant but to the information which the police had received prior to the application for a warrant. It was thought that that information, coupled with the circumstances of the case, including the fact of the bomb being in the house, of which the plaintiff was owner, raised a reasonable suspicion against the plaintiff that he was fully aware of what was being done. The

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.  
WOODROFFE  
J.

application for the warrant was actually under sections 4 and 5 and against the plaintiff as owner of the house. If the proceeding had been under section 6 presumably the written statement would have so said. It could not have done so, however, unless the gentleman who drew it had never seen the application, warrant, and proceedings in the case, including the plaintiff's own petition. However this be, it is plain that an erroneous statement in the pleadings (assuming that for the sake of argument, though not holding that there was one) cannot overcome the actual fact apparent on the face of the record and admitted by the plaintiff himself and his counsel. The latter should not (after having dealt with the case as one under section 5) have been permitted to shift his ground in the last stages of the case, in reply. I hold that it is established beyond all doubt that action was taken under sections 4 and 5 and not section 6, and that the defendants are not precluded by anything in their pleadings from avowing that which is plainly the fact. If, as I have found, the defendants were not responsible for the bomb, then section 5 justified the arrest of the plaintiff on its discovery in his house. In fact, Mr. Dutt is recorded as having said in the first Court that "if the plaintiff had been arrested on the 8th July nothing could have been said"; and this for the reason that the plaintiff was the owner of the house. His case then, and until he shifted it in reply, was that his client should (if the defendants' case be true) have been arrested on the 8th July, but the fact that he was not, but later on, on the 23rd, showed that Mr. Weston had no *bonâ fide* belief in his right to proceed against him as the owner of the house.

Mr. Dutt who personally cross-examined the witness Paramananda who was making charges

against him, suggested to him that Mr. Weston, in concert and conspiracy with the Maulvi and Mr. Hadrill, put up this witness to tell a false story, and either forged or put forward this document knowing it to be forged, which suggestion the witness denied. This suggestion was supported by another that Mr. Hadrill and the counsel then appearing for the Crown, were putting up with Mr. Weston and that the witness Akshoy Pal was there also. As in other cases, an attempt has been made before us to show that what was suggested was not that which the question put obviously meant, and that there was no charge against the defendants of fabricating this document, or using it, knowing it to be fabricated. This explanation I do not accept. The Advocate-General subsequently took exception to the examination. From that discussion it appears that the charge was understood and stated to be one of procuring false evidence and fabricating a document, or using as genuine a document known to be forged. Instead of counsel for the plaintiff at once rising and saying that "this is not our charge", they acquiesced in it and stated that they accepted full responsibility for it. In examination-in-chief Mr. Weston was examined as to the charge, which was specifically stated. Again, counsel for plaintiff acquiesced in the charge being as then stated. Again, according to the transcript, Mr. Dutt repeated his accusation of fabrication when Mr. Justice Fletcher pointed out that it had not been put to Mr. Hadrill, nor, I may add, to Mr. Weston, in cross-examination. And the learned Judge in his judgment, while holding the document to be a forgery, added: "But while saying this I am satisfied on the evidence that there is not the slightest ground for suspecting that either Mr. Weston or Mr. Hadrill had anything to do with it, nor did they in any way suspect that it

1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 WOODROFFE  
 J.

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.  
WOODROFFE  
J.

was not a genuine document." An application was made to Mr. J. C. Dutt, attorney for the plaintiff, to state the grounds on which this question was put, but Mr. J. C. Dutt replied that he was advised not to answer. An application to the Court by Mr. Hadrill for an enquiry was refused, the matter being *pendente lite*. Before us the matter has been put in this form, namely, that the document was put forward at the instance of Mr. Weston, though Mr. Bose says whether Mr. Weston had knowledge that the document was forged he "cannot say", nor can he say that the document was made at the instance of Mr. Hadrill. In my opinion, this is not a creditable manner of dealing with the question. In the first place no attempt should have been made to deny that the charge made was that which appears on the face of the question; which was understood and stated without objection by counsel for the defence; which was put to Mr. Weston without objection; which was repeated in express terms by Mr. Dutt in his reply; and which was so understood by the learned Judge who rejected it. Secondly, the learned Judge having found, as the fact is, that there was not the slightest ground for the charge, learned counsel should frankly have withdrawn it and then stated to the Court the grounds, if any really existed, on which Mr. Dutt considered himself justified in putting it.

Such grounds as have been put forward by Mr. Bose (for Mr. Dutt has not himself attempted to justify his charge) are no grounds whatever for the charge, which should never have been made. Mr. Garth has, in consequence, asked us to refer Mr. Dutt's conduct in preferring this unfounded charge, to the Court, for consideration whether action should be taken against counsel in respect of it. I do not, however, propose to do so; notwithstanding the number and reckless

character of other unfounded charges, exceeding any in my experience, which have been made in this suit, because I think that, with this expression of opinion, this case, which has already occupied enough of the public time, should in all its aspects now come to a close. I wish, however, to add some observations to what I have said. After this charge had been made the Advocate-General requested the Court to ask Mr. Dutt whether he made the charge on instructions, and if so, on whose. Mr. Justice Fletcher appears to have considered that he was not entitled to do that. In my opinion the Court is so entitled, and that were this not so, it would be powerless to prevent that abuse of cross-examination which the law directs. Instructions to counsel further are only privileged in the sense of being protected from disclosure to the opponent. There is no privilege as against the Court. If the latter calls for written instructions it cannot obviously use them as evidence in the cause which is tried, and for the purpose of such trial would have to treat them as confidential. They could, however, in my opinion, be called for then and there, and be used after the trial on the determination of the question whether disciplinary action should be taken against counsel by the Full Court to which the matter would then have to be referred. If the Court were shorn of this power it might not be able to take such action in a class of case which most justified it. The learned Judge also appeared to think (see interlocutory judgment not printed, dated 2nd February 1911) that he was prevented from acting by reason of the fact that the question reflected not on the witness but on a third party, and that section 150 of the Evidence Act must be referred back to section 146 which, in the opinion of the learned Judge, had no application. I am myself not prepared to hold that, even if section

1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 WOODROFFE  
 J.



1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 WOODROFFE  
 J.

146 did not apply, the Court could not do that which is necessary for the effective exercise of its disciplinary powers over advocates ; but I may further point out that even on a strict reading of these sections, section 146 did apply, for the question, though it did reflect on third parties, also reflected on the witness. I wish further to add that in my opinion it is not sufficient even to plead instructions. Counsel have a responsibility in the matter, and are not justified in making serious charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward.

In connection with this question of cross-examination, which appears to have been often conducted both in form, manner and tone in an insulting and provocative way, I notice that Mr. Dutt claimed to be entitled to regulate the civility which he should extend to a witness. On an objection by Mr. Gregory to the offensive tone of Mr. Dutt's examination of Captain Weinman, he is recorded as saying : "I have been more civil than he deserves." I see no ground for this observation in the evidence, and provocative remarks of this kind to witnesses should be disallowed. On another similar objection, in the case of another witness, the Court is reported to have remarked that it must allow some latitude to counsel. In my opinion, no latitude should be allowed in such matters at all. The cross-examination also contains a large number of unfair and misleading questions. When, moreover, counsel puts it to the witness that he may take a statement from him, or otherwise states the case, care should be taken to see that the witness may not have ground for thinking that his confidence has been misplaced.

It is obvious that the fact that a third party was kicked (if the story be true) on the 11th August, has

no bearing on the issue whether the defendants put a bomb in the plaintiff's house prior to the 8th of the preceding July, or arrested without cause the plaintiff on the 23rd of that month, however reprehensible in itself such savagery would be. Objection was also taken to the reference which the learned Judge says he made after the trial was over to some medical works not stated. The objection is well founded, for whatever a Court relies on should be made known at the trial to the parties, so that they may have an opportunity of adducing evidence or argument on the point: *Durga Prasad Singh v. Ram Doyal Chaudhuri* (1).

1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 WOODROFFE  
 J.

I now deal with the question whether Mr. K. B. Dutt should have accepted a retainer in this case; whether he should have been called as a witness; and what is the effect of his not having in fact been called. Though these matters raise questions of professional conduct, I am not dealing with them simply on this ground, but because they have a most important bearing on the decision of this case. Objection was taken before Mr. Justice Fletcher to Mr. Dutt's appearance as counsel in this case on the following main grounds:—That he had a personal interest in, and had in fact “engineered”, the case; that he had a personal knowledge of the facts of the case; that he was a proper and material and, indeed, necessary witness to facts in the case; that having been concerned in preferring charges he should support them by his testimony; and that both witnesses and counsel would be embarrassed by his appearance, the more particularly so as serious charges, such as bribery, were personally made against him. The learned Judge overruled these objections in the following

1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 WOODROFFE  
 J

passage:—"It was made a matter of deliberate and unrestrained attack on Mr. Dutt that he had not gone into the witness-box. Mr. Dutt has himself explained the reason of his abstention, and that reason appears to me to be satisfactory. His client, in whose favour his testimony would have been given, with full knowledge of this, saw fit to retain him as his counsel, and it cannot be suggested that there was anything improper in Mr. Dutt's accepting the retainer."

I will deal first with the question whether Mr. Dutt should have appeared as counsel in this case. Mr. Justice Fletcher is of opinion that it cannot be suggested that there was anything improper in his doing so. I should have myself, in the absence of any other authority, thought that under the circumstances of this case to which I shall refer, it was not proper I am, however, fortified in this view by the answers which were given by the Bar Council to certain questions put to them on this very matter, and in respect of this very case. We have referred to the Bar Council's report with the consent of counsel on both sides. It will be found set out in 16 C. W. N., XLVI. Their decision is of course not binding on us as Judges. But the Bar Council are the recognised authority on all matters of professional conduct and etiquette affecting counsel, and their opinion therefore is of the greatest weight and value. Their reply to the questions put to them was this: (i) If counsel knows or has reason to believe that he will be an important witness in a case he ought not to accept a retainer therein. (ii) If he accepts a retainer not knowing or having reason to believe that he will be such a witness, but at the opening or at any subsequent stage before evidence is concluded it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear in the case

unless he cannot retire without jeopardising the interests of his client. (iii) If counsel knows or has reason to believe that his own professional conduct on matters out of which the action arises is likely to be impugned in the case, he ought not to accept a retainer. (iv) If he accepts a retainer not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned, but finds in the course of the case that it is so impugned, he ought to adopt the same course of conduct as is mentioned in clause (ii) *ante*. (v) In either of the cases mentioned in clauses (ii) and (iv), there is no rule of professional ethics which debars counsel, if he continues to act as counsel in the case, from going into the witness-box and being cross-examined.

I agree with this opinion. The question then is whether Mr. Dutt does not come within rule (i), and of this, on the facts, there is, in my opinion, no question. Mr. Dutt is, I believe, one of the leading citizens of Midnapore and an old resident there, where he is, or was, the Chairman of its Municipality. He has also engaged in politics, was Chairman of the Midnapore Conference, and the chief of what is called the "Moderate" section of Nationalist politicians. His position is set out in the statement which he made under section 161 of the Criminal Procedure Code to the defendant Lal Mohan Guha. Mr. Dutt took some part in what are called *swadeshi* cases. He must be, from his position, of course, well aware of the political condition of Midnapore, and the ins and outs of Nationalist politicians, whether Moderate or Extreme, in the district. He was himself implicated in the informer Laha's reports as being a member of the so-called "bomb conspiracy". It is in evidence that from the 9th July to the 23rd July the plaintiff

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.  
WOODROFFE  
J.

1912  
WESTON  
AND OTHERS  
v.  
PRARY  
MOHAN DASS.  
WOODROFFE  
J.

consulted him almost daily, and reported to him what was being done as regards his son in prison, the alleged misdoings of the police, as also the plaintiff's own alleged conversations with Mr. Weston in particular; and this is extremely important, he was, according to the plaintiff, told that Mr. Weston had declared to the plaintiff that he knew him to be innocent, that he need not be nervous, but had notwithstanding told the plaintiff that he would arrest him if he did not get his son to make a confession which the plaintiff understood Mr. Weston to know to be a false one. Mr. Dutt was one of the spokesmen of the alleged grievances of Midnapore at the visit of Mr. Maddox on the 4th August, 1908. If we are to believe Maity he can also speak to the fact that Mr. Weston sent more than one chit to the plaintiff and the contents of them. He was present at the Pleaders' Library on the 15th August when Ashutosh made his alleged revelations about the police. On the 16th August he telegraphed and thereafter communicated with Government on the subject of the alleged misconduct of the police. He appears to have been concerned in the preparation of the statements of witnesses sent to Government against the police on the 27th August. He is said to have directed that note-books should be kept recording complaints against the police. He was present as counsel on the 31st August, when it is alleged that the Court was of set purpose kept by him in ignorance of the fact that his clients were filing petitions of retractation of confession. He is concerned in the subsequent proceedings. He was present as spokesman and gave evidence at Mr. Macpherson's enquiry. He is said to have had information of a large number, if not all, of the principal incidents in this case, such, for instance, as the alleged kicking of Surendra, and to have had

personal knowledge as to others. He is charged with having written a letter offering a bribe to the witness, Akhoy Pal, and is alleged to have bribed a large number of other witnesses in the case. In addition to his own personal interest, a number of the actors and witnesses in this case are Mr. Dutt's relations or connections, such as Madhu Sudan Dutt in charge of the room where the bomb at Saroda Dutt's house was found, Rash Behary Ghose, who Mr. Justice Fletcher thinks sent the "stabbing portrait" to Mr. Weston threatening his life, Sreenarain Pal, implicated by the reports, Jogjiban, an accused in the Arms Act case and the Midnapore bomb conspiracy case, Santosh Dass, the latter's mother-in-law, and Nibaran Chunder Mitter. The circumstances point to his having an interest in, and having taken an active, and I think leading, part in the institution and prosecution of this suit which represents in effect his own claims and grievances and those of others. It is not necessary, therefore, to go into every detail. It is sufficient to say that Mr. Dutt's name crops up in every part of the evidence either as the person directly concerned, or as having personal knowledge of the facts, or as being in a position to corroborate them.

It is obvious that, under these circumstances Mr. Dutt must have known that he was an important witness in the case, and it was therefore not proper of him to have accepted a retainer in the action. I wish to add a reference to a decision of this Court. One of the results of Mr. Dutt's appearance was this—that he had to examine and cross-examine as to matters on which he had personal knowledge, such as alleged conversations between him and the witness. And he actually cross-examined a witness who made charges of personal corruption against himself, a most

1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 WOODROFFE  
 J.

1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 WOODROFFE  
 J.

unseemly spectacle. In the decision to which I refer, which is unreported, *In the matter of certain Counsel*, (4th August 1908), the Full Bench observed as to the unprofessional and objectionable character of counsel cross-examining a witness as to facts within his personal knowledge. Sir Francis Maclean, C. J., then said, delivering the judgment of the Court: "I agree with what has fallen from the Advocate-General, that the effect upon the minds of a jury of a cross-examination conducted in this method might prove injurious to the administration of justice." The Chief Justice here refers to its effect on the jury, but as I will later show, the fact that Mr. Dutt has conducted this case has had a prejudicial effect on the mind of the learned Judge. The Chief Justice continued: "Suppose for a moment that a leading advocate were in cross-examination to put to the witness in the box a question of this sort,—'Why did you not tell me so and so, and so and so?' The possible effect upon the mind of the jury might be that they might regard the suggestion of counsel as being pitted against the statement of the witness, an entirely fallacious view, with the result that, in consequence, they might disbelieve the latter. The Chief Justice then considered the effect which might be produced upon the mind of the witness himself; how such an examination might be very embarrassing and conducive to his giving answers he might not otherwise have given. To these I add the obvious embarrassment of counsel on the other side in examining or cross-examining to personal charges against their opponent. The objection, I may lastly add, was not removed by Mr. Dutt saying instead of "Did I not do so?" "Did I not say so?", "Did not Mr. K. B. Dutt do or say so?"

I next deal with the question of whether, having accepted such a retainer, Mr. Dutt should nevertheless

have gone into the witness-box. Mr. Justice Fletcher then says: "Having done this (that is accepted the brief) it was in strict accordance with the rule of professional ethics of almost universal application, that, having taken up the position of an advocate, he should refrain from testifying at a trial which was being conducted by him." The learned Judge places the matter too high, as amongst other matters a reference to clause 5 of the Bar Council's report shows. There is nothing necessarily unprofessional in counsel giving evidence in a case in which he appears as such. There have been several cases, both in England and this country, in which this course has been taken without objection. Two unreported instances are noted in *Sethna v. Mirza Mahomed Shirazi* (1). It is true that in that case Mr. Justice Beaman held absolutely that the Court would not allow counsel conducting cases to give evidence on behalf of their clients in respect of matters with which they were acquainted before they were retained, but that they might do so as regards matters occurring after their retainer. But such decision is, in my opinion, erroneous. It omits to notice that *Stones v. Byron* (2), and *Deane v. Packwood* (3), were not followed in *Cobbett v. Hudson* (4). It is opposed to Mr. Inverarity's case, which the learned Judge cites. Considered as a rule of absolute exclusion, as opposed to an expression of opinion of what is desirable, the decision is in direct conflict with the Evidence Act, and both with the Privy Council decision to which I next refer, and the opinion of the Bar Council regulating questions of professional conduct above cited. The learned Judge who decided that case failed to distinguish between competency and the opinion that

1912

WESTON  
AND OTHERS  
v.  
PEABY  
MOHAN DASS.  
WOODROFFE  
J.

(1) (1907) 9 Bom. L. R. 1044.

(3) (1847) 4 Dowl. &amp; L. 395 n.

(2) (1846) 4 Dowl. &amp; L. 393.

(4) (1852) 1 E. &amp; B. 11.



1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 WOODROFFE  
 J.

as a general rule it is desirable that the same person should not be both advocate and witness. In the Privy Council decision, *Corea v. Peiris* (1), a gentleman named Schroder was examined as witness, though counsel in the case. The Judicial Committee did not disapprove of this as contrary to the professional ethics of which Mr. Justice Fletcher speaks, but on the contrary there stated that counsel had been properly examined.

The true rule in such matters is, in my opinion, as follows. Counsel though they may be engaged in the case are in law competent to testify whether the facts in respect of which they gave their evidence occurred before or after their retainer [*see* s. 118 of the Evidence Act, and *Cobbett v. Hudson* (2)]. The Court has no authority to exclude such evidence if tendered. It is not in all cases a breach of professional ethics for counsel retained in the case to give his evidence in it. There are cases in which he properly may, and, indeed, should do so. At the same time it is recognised by both the Court and the profession that, as a general practice, it is undesirable, when the matter to which counsel deposes is other than formal, that they should testify either for or against the party whose case they are conducting. In judging the matter from the point of view of what is desirable as opposed to what is legal, much must depend on the circumstances of each case. In the present case having regard to Mr. Dutt's interest in the proceedings, the fact that he has taken part in the events referred to in them, and has both personal and reported knowledge of a very large number of the facts testified to in the evidence, it was in a high degree undesirable that he should have been both counsel and witness. The real objection in Mr. Dutt's case is that he was counsel in the

case and not, therefore, as he would properly otherwise have been, a witness. I may added that *Curry v. Walter* (1), to which Mr. Bose referred, has no bearing. There counsel was subpoenaed to prove what had been stated by him on motion in Court. The Court was of opinion that on such a matter counsel should not be called, but that the party should prove it by other means, or witnesses who are present; but it should be at the option of the counsel whether he would give his testimony or not. The Court therefore decided that it was not obligatory on counsel in such a matter to give evidence, though he might do so if he liked. It did not decide that he could not give evidence. It is further of no authority in this country where counsel must obey a subpoena to give evidence, as any one else must do.

The next point (which is the material one here) is whether the appellants were entitled to ask the learned Judge to draw inferences adverse to the plaintiff from the fact that Mr. Dutt had not been called. This they were clearly entitled to do. If it be a fact that under the circumstances of this case Mr. Dutt could not properly have been both counsel and witness, those circumstances also show that it was improper of him to have been counsel at all. And if he were not counsel, there can be no possible question but that he was a material and necessary witness. It was not open to Mr. Dutt to act in breach of a professional rule, and then to plead the fact of such breach both as a reason why he could not be a witness and also why adverse comment should not be made upon the fact that he was not a witness. If it be that as counsel he ought not, under the circumstances of this case or otherwise, to have been a witness, then it was the act of his client which made Mr. Dutt counsel, and he

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.  
WOODROFFE  
J.

cannot plead his own act against such comment. If Mr. Justice Fletcher's view were correct, then if a litigant is aware that a particular counsel has knowledge of a fact which he does not wish disclosed, or that such counsel's evidence if given would contradict him, he has only to retain him and then say to the Court: "You must not draw inferences against me, because I do not call the man who can speak to the facts which I ask the Court to believe, for I have made him my counsel."

The next question is, what is the nature of the inference which should be drawn from the fact that the plaintiff has put forward Mr. Dutt as his counsel and not as his witness? The learned Judge says: "Mr. Dutt has himself explained the reason of his abstention (from the witness-box) and that reason appears to me to be satisfactory." What those reasons were are not stated, and the learned Judge has therefore not placed us in a position to appreciate them. But if those reasons were that Mr. Dutt had not in fact personal knowledge of the facts, or were a statement of the extent to which he was concerned in those facts, or as to the nature of those facts, such a statement being in the nature of evidence should have come from him in the stand, and not from his place at the Bar. The learned Judge next says: "His client, in whose favour his testimony would have been given, with full knowledge of this fact saw fit to retain him as his counsel." How and on what grounds could the learned Judge assume, as he here does, that had Mr. Dutt been a witness, which he was not, his testimony would have been given in favour of his client? This observation indicates the danger to which Sir Francis Maclean, C.J., in the case above cited, referred, namely, that inferences unsupported by the evidence of counsel himself may be drawn from his

mere appearance in support of a cause of the facts of which he is alleged to have personal knowledge. So far from the inference being what the learned Judge states, it is precisely the other way. The learned Judge has himself correctly stated the rule when dealing with the defendants' case, viz., that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. The same rule applies to Mr. Dutt, for whether he could or could not as counsel have given evidence in this case, he should not have been counsel, and could and should have given evidence for the reasons I have given.

On this matter it only remains to indicate on what points such presumption should in this case work. It works as regards every one of the facts, to the chief of which I have alluded, in which Mr. Dutt was himself an actor, or had alleged personal or reported knowledge. I need not repeat them here. They are also mentioned in detail in the evidence. I only say here that in my opinion the most important points affected by this presumption are the alleged reports made to Mr. Dutt between the 8th and 23rd July as to the alleged conduct of Mr. Weston and the police, subsequent information on the same points received by him, the circumstances leading to the institution of this suit; and matters in the suit itself, such as the incident of the 31st August which Mr. Dutt, who was then counsel, makes the basis of a charge of dishonesty against the defendants and the presiding magistrate, Mr. Nelson. So far from presuming, as the learned Judge does, that Mr. Dutt's testimony on these and other points would have been in favour of his client, I presume the other way, and the learned Judge might have himself so found if Mr. Dutt had gone into the stand. One of the chief grounds on

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS,  
WOODROFFE  
J.

which this suit has been decreed against Mr. Weston is the alleged conversations he had with the plaintiff when he is supposed to have repeatedly told the latter that he was innocent, that there were therefore no grounds for proceeding against him and that he need not be nervous, and yet that he expressly avowed his alleged illegalities by telling the plaintiff that he would arrest him nevertheless if he did not get a confession from his son. These conversations are said to have been reported to Mr. Dutt at the same time. Is it to be conceived that if Mr. Dutt had been told about these at the time it would not have been of the first importance that this should be proved? Would not Mr. Dutt have been called to give that presumptively independent evidence which the suit now lacks? I assume that Mr. Dutt was not called because he could not corroborate the plaintiff, or his case, on this, or other points. Had he done so, it would have been necessary for him to explain how he did not mention the subject of the alleged reported conversations to Mr. Maddox on the 4th August, but had, on the contrary, no complaint to make against Mr. Weston; how he did not mention it in his letter to Government of the 27th August; how it finds no place in the subsequent proceedings, and does not see the light of day until this suit, and then, after Bonomali's charge had failed, it is put forward as the basis of the new case on which the suit has been decreed.

In this connection I desire, in justice to counsel for the appellants in the first Court, to deal with another matter. Mr. Justice Fletcher, who has, in my opinion erroneously approved of Mr. Dutt's conduct, has, on the other hand, in my opinion, passed an undeserved judgment on the conduct of counsel for the defence. After having observed that Mr. Dutt had

followed the rule of professional ethics, he continues: "I may observe that this rule of professional conduct was not, I regret to say, observed by Mr. Dutt's opponents." This observation is based on the fact that Mr. Norton called Mr. Gregory (a junior counsel in the case) as his witness, and the latter gave his evidence. Mr. Gregory was called to repel a suggestion of Mr. Dutt, who in his numerous charges has not spared members of his own profession, that Mr. Gregory had not in respect of a particular matter, viz., that arising out of exhibit 61, properly and fairly conducted the case before the Sessions Judge, and had attempted to keep back the document from the Court. Mr. Gregory from his place at the Bar gave his explanation. Though not so bound, it was properly open to Mr. Dutt to accept a statement made in such a matter, and in such circumstances, from a fellow member of his own profession. He refused and objected to the statement being made. Thereupon Mr. Norton put Mr. Gregory in the witness-box, when he was cross-examined at length by Mr. Dutt, who, amongst other matters, thrice made to him the misleading suggestion that the counsel Mr. Morrison was not present in Court on the 23rd when A. K. Pal, who speaks to this document, was examined, though it is clear from the record that he was in fact present. I have already stated what in my opinion the general rules are as regards the calling of counsel as witness. In my opinion Mr. Norton was fully justified in calling Mr. Gregory, both in protection of the latter's professional reputation, which had been in fact groundlessly assailed, and of his own client's interest.

In this connection I may cite an observation of Sir Francis Maclean, C. J., in the case of *Nundo Lal Bose v. Nistarini Dassi* (1): "I can scarcely suppose

1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.

that any counsel, if he understood that the other side were not prepared to accept his statement made upon his word of honour, would not himself ask that he might be allowed to give his evidence in the usual way."

WOODROFFE  
 J.

Mr. Norton has also invited our opinion on another matter on which the learned Judge has censured him. During the examination of the witness Mr. Wilson, the latter produced at the request of Mr. H. D. Bose, who was cross-examining him, a private pocket-book. An irrelevant cross-examination on it followed. The book being a private one, Mr. Norton marked the pages to which counsel might refer in respect of the subject of his cross-examination, the other pages referring to other matters. Mr. Bose, however, looked at pages which had not been so marked. On the face of it this was highly improper on the part of Mr. Bose, and Mr. Norton appears to have naturally expressed his opinion strongly to this effect. The learned Judge is, however, stated not to have then and there, as I think should have been done, determined who was in fault. Mr. Bose brought in next day a written explanation of his conduct, which the learned Judge is said to have refused to have gone into, and then the matter ended until the judgment, when the learned Judge observed as follows:—"I may further add that I viewed at the time, and still view, with complete disapproval Mr. Norton's unfounded and abusive attack on Mr. Dutt's junior, Mr. H. D. Bose." I do not know what the explanation was which Mr. Bose offered, and on which the learned Judge refused to adjudicate, and I am not therefore in a position to say whether Mr. Bose was to blame. *Primâ facie* and in the absence of proper explanation Mr. Norton was justified in taking strong exception to Mr. Bose's conduct. The matter might have been decided then

and there, but as it was not, I cannot say that Mr. Norton was open to censure. I may further observe that the judgment states no grounds on which it is based, though the admitted fact that Mr. Bose from one cause or another looked at the un-

191  
WEST  
AND OT  
T.  
PEAR  
MOHAN I  
WOODRO  
J.

marked pages, in my opinion, called for such grounds. It only remains on the questions of fact in this case to put together the different conclusions for which my reasons have been previously given.

The fifth issue raises the question of limitation. The Advocate-General contended, and in my opinion rightly, so far as regards the causes of action for malicious arrest and prosecution, that the suit was barred. Upon these causes of action the suit should have been dismissed *in limine*. The learned Judge, however, stated that he would subsequently hear the argument about limitation, and would meanwhile hear the evidence. The plaint is not, as the learned Judge has stated, a "mofussil pleading," which according to Privy Council rulings of about the middle of last century and later (when such pleadings were often very imperfect) should not be read too strictly. It was no doubt filed in a Mofussil Court, but is in the English form of pleading, and I should say had been settled by counsel, as one would also naturally expect in a case of this importance. Now the suit is described in the plaint as "valued at Rs. 10,000 on account of damages for wrongful confinement and malicious prosecution." Though the plaint also alleges trespass, it seems that the suit was really based on the two other torts, as it is in respect of these that damage is alleged to be suffered, and the cause of action is said to have arisen on the 31st August, 1908, when the plaintiff was set at liberty. I will, however, assume that, with malicious arrest and prosecution, was included trespass. All these acts are well known



1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY .  
 MOHAN DASS.

WOODROFFE  
 J.

that any counsel, if he understood that the other side were not prepared to accept his statement made upon his word of honour, would not himself ask that he might be allowed to give his evidence in the usual way."

Mr. Norton has also invited our opinion on another matter on which the learned Judge has censured him. During the examination of the witness Mr. Wilson, the latter produced at the request of Mr. H. D. Bose, who was cross-examining him, a private pocket-book. An irrelevant cross-examination on it followed. The book being a private one, Mr. Norton marked the pages to which counsel might refer in respect of the subject of his cross-examination, the other pages referring to other matters. Mr. Bose, however, looked at pages which had not been so marked. On the face of it this was highly improper on the part of Mr. Bose, and Mr. Norton appears to have naturally expressed his opinion strongly to this effect. The learned Judge is, however, stated not to have then and there, as I think should have been done, determined who was in fault. Mr. Bose brought in next day a written explanation of his conduct, which the learned Judge is said to have refused to have gone into, and then the matter ended until the judgment, when the learned Judge observed as follows :—"I may further add that I viewed at the time, and still view, with complete disapproval Mr. Norton's unfounded and abusive attack on Mr. Dutt's junior, Mr. H. D. Bose." I do not know what the explanation was which Mr. Bose offered, and on which the learned Judge refused to adjudicate, and I am not therefore in a position to say whether Mr. Bose was to blame. *Prima facie* and in the absence of proper explanation Mr. Norton was justified in taking strong exception to Mr. Bose's conduct. The matter might have been decided then

and there, but as it was not, I cannot say that Mr. Norton was open to censure. I may further observe that the judgment states no grounds on which it is based, though the admitted fact that Mr. Bose from one cause or another looked at the unmarked pages, in my opinion, called for such grounds.

191  
WEST  
AND OT.  
v.  
PEAR  
MOHAN I  
WOODR  
J.

It only remains on the questions of fact in this case to put together the different conclusions for which my reasons have been previously given.

The fifth issue raises the question of limitation. The Advocate-General contended, and in my opinion rightly, so far as regards the causes of action for malicious arrest and prosecution, that the suit was barred. Upon these causes of action the suit should have been dismissed *in limine*. The learned Judge, however, stated that he would subsequently hear the argument about limitation, and would meanwhile hear the evidence. The plaint is not, as the learned Judge has stated, a "mofussil pleading," which according to Privy Council rulings of about the middle of last century and later (when such pleadings were often very imperfect) should not be read too strictly. It was no doubt filed in a Mofussil Court, but is in the English form of pleading, and I should say had been settled by counsel, as one would also naturally expect in a case of this importance. Now the suit is described in the plaint as "valued at Rs. 10,000 on account of damages for wrongful confinement and malicious prosecution." Though the plaint also alleges trespass, it seems that the suit was really based on the two other torts, as it is in respect of these that damage is alleged to be suffered, and the cause of action is said to have arisen on the 31st August, 1908, when the plaintiff was set at liberty. I will, however, assume that, with malicious arrest and prosecution, was included trespass. All these acts are well known

1912  
WESTON  
AND OTHERS  
v. "  
PEARY  
MOHAN DASS.  
WOODROFFE  
J.

torts, and the only peculiarity about the suit is that the plaintiff alleges that these torts were committed by three men acting in conspiracy, instead of by one. In one sense this allegation of conspiracy is immaterial to the action, for the acts alleged are such that if proved against any one defendant, he is entitled as against that defendant to a decree. The reason, however, why conspiracy is alleged is obvious. According to the plaintiff it was the Maulvi who was directly responsible for the bomb; so, in order to implicate Mr. Weston and the other defendants in the charge, it had to be alleged that there was a conspiracy between him and them to do this act. Similarly, it was Mr. Weston who ordered the arrest which is alleged to be done in conspiracy with the other defendants to bring them into the charge. But the suit remains what it is—a suit against joint tort-feasors. If it was a suit against one person, it would be admittedly barred as regards the arrest and prosecution. I may leave out of account the alleged trespass if that was part of the cause of action, as the result of Mr. Justice Fletcher's judgment is that there was no trespass in fact, and that also is what I have held. If the suit is barred as against one person, the period of limitation is not extended because it happens to be against three. This is admitted. But then it is said, and Mr. Justice Fletcher has held, that there is another cause of action which the plaintiff has himself nowhere stated. It is said that besides the cause of action on the torts, there is a cause of action to recover special damage by reason of a conspiracy to cause damage. The learned Judge accordingly framed an issue which does not arise on the pleadings, alleging a general conspiracy to cause damage of which the trespass, arrest and malicious prosecution were merely the overt acts. I have asked learned counsel to produce

to the Court authority for the proposition on which the learned Judge has proceeded, viz., that the same set of facts may constitute two causes of action, viz., for a tort and for a conspiracy to cause damage. And none has been produced. The reason of this is that the two exclude one another. If a joint tort is committed there is no necessity to have recourse to any law of conspiracy. And on an action to recover damage resulting from a conspiracy, as distinct from an action on a joint tort, the conspiracy is one to do an act which, if done by an individual, would not constitute a tort, but is actionable by reason of special damage having been caused thereby. The two in fact are mutually exclusive. There is a conspiracy to commit a crime; a conspiracy to commit a tort; and a conspiracy for an unlawful purpose in respect of an act which, if done by an individual, would neither be a crime nor a tort. All these may be the subject of criminal prosecution. In respect of the civil remedy, where there is a joint tort, the action is on the tort against the joint tort-feasors. In any other case, where in carrying into effect the conspiracy the conspirators inflict damage on a individual, he may sue for the particular damage he has thus separately suffered. In the former case the cause of action is on the tort, and in the latter on the special damage. There is a further difference in that in actions on tort, general damage is, except in special cases, sufficient, whereas in such a conspiracy there must be special damage. The class of cases to which the learned Judge refers establishes that there are instances in which two or more persons can render themselves liable to civil proceedings by combining to injure the plaintiff, although if one of them did the same act by himself and without any pre-concert with others he would escape liability, both civil and criminal. I agree with the

1912  
WESTO  
AND OTH  
".  
PEARY  
MOHAN D.  
WOODRO  
J.

1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 WOODROFFE  
 J.

learned Judge in thinking that an action on such a conspiracy would lie in this country, but the point here is different, viz., what is the plaintiff's cause of action, and what is the limitation applicable? It appears to me to be quite clear that the suit is on joint torts, and that the arrest, imprisonment and prosecution are governed by the one-year rule under articles 19 and 23 of the Limitation Act. Mr. Justice Fletcher is of opinion that though the suit is described as a suit for malicious prosecution, it is in fact not one. Whilst the learned Judge assigns no grounds for this view, it also appears to be inconsistent with a previous statement made by him, that the plaintiff had two causes of action—one for damage and one for malicious prosecution. As the learned Judge's finding as regards trespass and search was a dismissal on the facts, it is not necessary to enquire whether articles 36 or 39, or both, would apply so far as the suit alleges wrongful search and trespass. In my opinion the suit is barred on the other causes of action, and should not have been entertained on that cause of action on which it has been decreed. On the sixth and last issue I am of opinion that if it was necessary, as according to the learned Judge's view of the case it was, to prove special damage, such damage has not been proved. Portion (but what is not stated) of the Rs. 1,000 which the learned Judge has given the plaintiff was, it appears, spent to obtain the release of his son, which is not damage to the plaintiff in this suit, and no evidence strictly so-called has been called to prove the expenditure of the residue. These findings dispose of all the issues, both of fact and law, before us.

I would accordingly decree this appeal and dismiss the suit, the plaintiff-respondent paying all (including reserved) costs in both Courts.

COXE J. I entirely concur with the judgment of Mr. Justice Woodroffe both as to the order and as to the grounds therefor.

1912  
WESTC  
AND OTH  
v.  
PEARY  
MOHAN D

D. CHATTERJEE J. This appeal arises out of a suit described as one for damages for wrongful confinement and malicious prosecution. The defendants pleaded limitation before the Court below, but were overruled. The question of limitation has been pressed before us and I shall deal with it first.

The plaintiff was arrested on the 23rd of July and discharged on the 31st of August 1908. The suit was filed on the 15th of November 1909, *i.e.*, more than one year after the discharge, and would therefore be barred in so far as it was one for wrongful confinement, or false imprisonment and malicious prosecution under articles 19 and 23, schedule 1, of the Limitation Act. The plaintiff's legal advisers evidently saw this, and it was stated in the 14th paragraph of the plaint that, the period of the notices served under section 80 of the Civil Procedure Code being excluded, no part of the plaintiff's case was barred. The Court below has held, however, that no such notice was necessary, and no exception has been taken to that view of the law before us, and no reliance has been placed upon any such notice as an answer to the plea of limitation. It has been contended, however, that the suit was based on a conspiracy between the several defendants, and as conspiracy is a distinct cause of action by itself, the suit must fall either under article 36 or article 120, and is therefore not barred; it has been further contended that the illegal search of the plaintiff's house is a cause of action which at least is not barred, as it would fall either under article 36 or article 39 or article 120. The first contention as regards conspiracy has found favour with Mr. Justice

1912  
WESTON  
AND OTHERS  
v.  
PEARY  
MOHAN DASS.  
CHATTERJEE  
J.

Fletcher, and I shall deal with it first. The learned Judge has relied on the case of *Quinn v. Leatham* (1) and Mr. Dutt has also relied on the same in support of his argument. The learned Judge says: "The truth of the matter is that in a case like the present the plaintiff has two causes of action—one to recover the damage that has been occasioned to him as the result of the conspiracy, and the other to recover damages for malicious prosecution against the defendants as joint tort-feasors. This is well illustrated by the case of *Quinn v. Leatham* (1)." With great deference I think that that case itself contains an answer to the argument. Lord Halsbury, in delivering the first judgment in that case, says: "There are two observations of a general character which I wish to make—one is, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." Now what are the facts in *Quinn v. Leatham* (1), and what does the case decide? The defendants were the officer-bearers of a trade-union; they threatened the plaintiff with injury if he employed men who were not members of the union; the plaintiff was willing to have his men enrolled as members, but defendants insisted on his dismissing them and taking members of the union in their place; the plaintiff refused, and they then threatened a large customer of the plaintiff with injury if he dealt with the plaintiff, and thus

(1) [1901] A. C. 495, 506.

compelled him to cease to deal with the plaintiff. The plaintiff brought a suit for damages. The plaintiff had every right to carry on his trade in the way most profitable to him, provided he did not infringe on the rights of other people, and so had the customer of the plaintiff every right to deal with whomsoever he pleased under similar restrictions, and the defendants had maliciously invaded this right of the plaintiff and injured him by unlawful means, and the defendants were therefore held liable. It was found that there was conspiracy and threats carried into execution by the defendants to the injury of the plaintiff, the object being not to serve any trade interests of their own, but to injure the plaintiff, because he would not comply with their requisition to dismiss his innocent servants. It is true that the concerted action of a number of men has an element of aggravation, and is more irresistible than the unaided act of a single individual, and some of the cases support the view that a combination of several persons to do an unlawful act may be actionable when a similar act by an individual is not, but I do not think there is any authority for holding that a tort, when committed by several persons acting in concert, is different from the same tort committed by a single individual. A trespass is a trespass, whether it is committed by one person or by more, and so is a malicious prosecution or false imprisonment. The combination in such cases may be an element of aggravation in the assessment of damages, but does not to my mind suffice to make it a different tort. In the very case of *Quinn v. Leatham* (1), Lord Lindley said: "It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by

(1) [1901] A. C. 495, 537.



1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 CHATTERJEE  
 J.

many acting in concert makes no difference. My Lords, one man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had, could not have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action."

In a similar case, *Giblan v. National Amalgamated Labourers' Union* (1), Lord Justice Romer said: "I should be sorry to leave this case without observing that, in my opinion, it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of;" and Lord Justice Stirling said: "I am far from satisfied that they are not such as to be illegal, even if done by a single individual." Read by the light of the facts, the case decides no more than this, that a number of persons who, without justification, intimidate a third person by threats of doing him harm, and thereby coerce that third person into causing harm to the plaintiff, are guilty of an actionable wrong. *Giblan's* case shows that conspiracy or wrongful combination is not a material element in the constitution of the wrong. In this country the Legislature has made a general provision that suits for damages for false imprisonment or malicious prosecution must be brought within a certain period, and no distinction is made in respect of the number of persons by whom the wrong may have been perpetrated. If it were not so, the greatest uncertainty would be introduced into the law of limitation applicable to a particular case, for, a plaintiff might easily take his case out of the statute by charging

(1) [1903] 2 K. B. 600, 619, 623.

more than one person with a wrong, and a defendant would not know when he is secure against a charge. But supposing that conspiracy to perpetrate a wrong was a separate cause of action by itself, it would not be actionable unless it caused special damage by itself. In the present case, however, the whole damage caused is by reason of the imprisonment and prosecution. The plaintiff deposes that the imprisonment cost him Rs. 1,000 in law charges, and that is the only damage proved and decreed. The present case, therefore, considered as a suit for damages for wrongful confinement and malicious prosecution is barred by limitation under articles 19 and 23 of the first Schedule to the Limitation Act.

There is a side issue as to whether Mr. Dutt ought to have appeared as a witness in the case and not as counsel? I think he ought to have appeared as a witness. He could have thrown light on many parts of the case in which we have had to grope in the dark. I think the case of the plaintiff on the facts has suffered materially by reason of his absence from the witness-box, whilst he himself has been made the subject of repeated attacks without any means of adequately answering them. I think he has been sadly misadvised in this matter. There was a reference to the English Bar Council by the legal advisers of the appellants and an opinion obtained which will be found on page xlvi, 16 Calcutta Weekly Notes. This I have no doubt is no authority for the Court, and was allowed to be read only with the consent of Mr. Dutt. The opinion of the Council is against Mr. Dutt. The opinion of the Privy Council in the case of *Corea v. Peiris* (1) also seems to support the same view. There the respondent tendered his own

191  
WESSE  
AND OT  
v.  
PEAI  
MOHAN  
CHATTER  
J.

1912  
 WESTON  
 AND OTHERS  
 v.  
 PEARY  
 MOHAN DASS.  
 CHATTERJEE  
 J.

counsel as a witness and the District Judge refused to admit his evidence. The Supreme Court of Ceylon, on appeal, had him examined, and the Privy Council say as to this: "He was tendered as a witness for the respondent at the trial, but the District Judge ruled on some quite unsustainable ground, that, being the respondent's advocate, his evidence was inadmissible. The Supreme Court most properly, in their Lordships' opinion, permitted him to be examined." It is a pity, therefore, I repeat that he considered himself debarred by any rule of professional ethics from giving his evidence in the case.

Complaint has also been made that some of his questions in cross-examination were without justification. It may be that his own personal knowledge of the facts supplemented his instructions in these matters, but that is the more a reason why he should have given his evidence under the sanction of an oath and subject to the test of cross-examination. The suggestions made, however, have been abandoned.

C. E. B.

*Appeal allowed.*

## CIVIL RULE.

*Before Mookerjee and Holmwood JJ.*

NANDA KISHORE SINGH

v.

RAM GOLAM SAHU.\*

1912

Sept. 5.

*High Court, jurisdiction of—Stay of Execution—Inherent Powers of Court—Special leave to appeal to the Privy Council—Civil Procedure Code (Act V of 1908) ss. 112 and 151 ; O. XLI, r. 5 (2)—Letters Patent, 1865, cl. 36.*

The High Court is competent to make an order for stay of proceedings in execution of its decree in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council.

*Harro Chunder Roy Chowdhry v. Shoorodhoney Debia* (1), *Panchanan Singha Roy v. Dwarka Nath Roy* (2), *Hukum Chand Boid v. Kamalanand Singh* (3), *Mahomed Wahiduddin v. Hakimian* (4), *Tara Pado Ghose v. Kamini Dassi* (5), *Mahadeo v. Budhai Ram* (6), *Gajju v. King Emperor* (7), *Brij Coomaree v. Ramrick Dass* (8), *Nityamoni Dasi v. Madhu Sudan Sen* (9) referred to.

RULE granted to Nanda Kishore Singh and others, the defendants.

The circumstances under which this Rule was obtained were as follows. The petitioners were defendants in a mortgage suit valued at less than Rs. 10,000.

\* Civil Rule No. 4293 of 1912 (Application in the matter of Appeal from Original Decree No. 531 of 1908, and Privy Council Appeal No. 22 of 1911).

(1) (1868) 9 W. R. 402.

(5) (1901) I. L. R. 29 Calc. 644.

(2) (1905) 3 C. L. J. 29.

(6) (1904) I. L. R. 26 All. 358.

(3) (1905) I. L. R. 33 Calc. 927 ;

(7) (1905) 2 All. L. J. 173.

3 C. L. J. 67.

(8) (1901) 5 C. W. N. 781.

(4) (1898) I. L. R. 25 Calc. 757.

(9) (1911) I. L. R. 38 Calc. 335 ;

L. R. 38 I. A. 74.

1912  
NANDA  
KISHORE  
SINGH  
v.  
RAM GOLAM  
SAHU.

The Court of first instance dismissed the suit on the merits. On appeal to the High Court that decree was reversed, and the usual mortgage decree made on the 16th February 1911. The defendants subsequently applied to the High Court for leave to appeal to His Majesty in Council. During the pendency of this application the plaintiffs made an application to the Court of first instance for execution of their mortgage decree. On the 19th March 1912 the application for leave to appeal to His Majesty in Council was refused. The defendants then applied to the High Court to review this order and this application was also refused on the 16th April 1912. The defendants, thereupon, on the 7th July 1912, moved the High Court and obtained the present Rule for staying proceedings in execution of the mortgage decree in view of an application by them to the Judicial Committee for special leave to appeal to His Majesty in Council

*Babu Upendra Nath Chatterjee*, for the petitioners. Although leave to appeal to His Majesty in Council was refused by the High Court, the defendants still have it open to them to apply to the Judicial Committee for special leave to appeal, and steps have already been taken by them for this purpose. My submission, therefore, is that, until this application for special leave is disposed of, the mortgage decree of the High Court is not a final decree. Under O. XLI, r. 5 (2) of the Code of Civil Procedure, 1908, the High Court has jurisdiction to stay proceedings in execution in the present case; but if it be held that this Order is not applicable to this case where special leave to appeal to His Majesty in Council has to be obtained, then I submit that by analogy to the cases governed by that Order, the High Court has jurisdiction to stay execution in the present case pending the filing of

such an appeal. Had an appeal been actually filed, there would have been no question about the jurisdiction of the High Court: see *Nitaymoni Dasi v. Madhu Sudan Sen* (1). I submit that this jurisdiction should now be extended to the present case, as it will take some time before the matter can be brought on before their Lordships of the Judicial Committee, and my clients will be seriously prejudiced if in the meantime the mortgaged properties be sold. I further submit, that the High Court is the proper Court to consider this application for stay of proceedings, as it is in a better position to deal with the facts of this case than their Lordships of the Judicial Committee.

*Babu Kshetra Mohan Sen*, for the opposite party. There is no provision in the Code of Civil Procedure justifying a stay of execution in a decree which has been passed by the High Court and in which leave to appeal to His Majesty in Council has been refused. The mortgage decree passed by the High Court in the present suit has, therefore, become a final decree, and unless an appeal or an application for leave to appeal is actually pending, the High Court has no jurisdiction to stay proceedings in execution.

*Cur. adv. vult.*

MOOKERJEE J. This Rule raises a question of first impression and of considerable importance, namely, whether this Court is competent to make an order for stay of proceedings in execution of its decree, in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council. The circumstances under which the application has been made are not disputed and may be briefly stated. The petitioners were defendants in a mortgage suit. The Court of first instance

1912  
NANDA  
KISHORE  
SINGH  
v.  
RAM GOLAM  
SAHU.

1912  
—  
NANDA  
KISHORE  
SINGH  
v.  
RAM GOLAN  
SAHU.  
—  
MOOKERJEE  
J.

dismissed the suit on the merits. On appeal to this Court, that decree was reversed, and the usual mortgage decree made on the 16th February 1911. The defendants applied to this Court for leave to appeal to His Majesty in Council. This application was refused on the 19th March, 1912, on the ground that the decree did not involve a claim to property of the value of Rs. 10,000 or upwards. The defendants applied to this Court to review this order; that application was refused on the 16th April 1912. The position, therefore, is that in so far as the Courts of this country are concerned, the mortgage decree has become final. On the 7th July, 1912, the defendants, however, made the present application for a stay of proceedings in execution of our decree, for which the decree-holder had applied to the Court below on the 2nd November 1911, during the pendency of the application in this Court for leave to appeal to His Majesty in Council. The present Rule was granted on the application of the 7th July 1912. The petitioners state in their affidavit that they have taken steps to apply to the Judicial Committee for special leave to appeal to His Majesty in Council, and at the hearing before us, the learned vakil for the petitioners stated that the papers and costs have been transmitted to their Solicitors in England. The decree-holders opposed the application on the ground that as no appeal or application for leave to appeal is pending in this Court or elsewhere, the Court has no jurisdiction to grant a stay of proceedings. It is not disputed that there is no statutory provision applicable to this question; indeed, the absence of a provision in this behalf is not a matter for surprise, because the Code of Civil Procedure does not deal with applications for special leave to appeal to His Majesty in Council, though section 112 of the Code of 1908 declares that nothing

in the Code shall be deemed to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council. The question, therefore, arises whether this Court is competent, in the exercise of its inherent power, to stay proceedings under these circumstances. Section 151 of the Code does not lay down any new principle, but merely declares that the Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The existence of this inherent power to do justice has been recognised from the earliest times: *Hurro Chunder Roy Chowdhry v. Shoorodhonee Debia* (1) and has been repeatedly affirmed *Panchanan Singha Roy v. Dwarka Nath Roy* (2), *Hukum Chand Boid v. Kamalanand Singh* (3). This inherent power is not, as has sometimes been supposed, capriciously or arbitrarily exercised; it is exercised *ex debito justitiae* to do that real and substantial justice for the administration of which alone the Court exists. In other words, as Mr. Justice Woodroffe puts it in *Hukum Chand Boid v. Kamalanand Singh* (3), the Court in the exercise of such inherent power must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the Legislature. It is not necessary for my present purpose to formulate the circumstances under which a Court will exercise its inherent power; various instances will be found mentioned in the judgments in *Hukum Chand Boid v. Kamalanand Singh* (3). Amongst obvious cases may be mentioned, consolidation of suits and appeals, postponement of the hearing of a suit pending the

1912  
 NANDA  
 KISHORE  
 SINGH  
 v.  
 RAM GOLAM  
 SAHIT.  
 MOOKERJEE  
 J.

(1) (1868) 9 W. R. 402.

(2) (1905) 3 C. L. J. 29.

(3) (1905) I. L. R. 33 Calc. 927 ;

3 C. L. J. 67.



1912  
 ———  
 NANDA  
 KISHORE  
 SINGH  
 v.  
 RAM GOLAM  
 SAHU.  
 ———  
 MOOKERJEE  
 J.

decision of a selected action, stay of cross suits on the ground of convenience, enquiry as to whether all the proper parties are before the Court, entertaining an application of a stranger to be made a party, the addition of a party, entertaining a defence *in forma pauperis*, deciding one question while reserving another for investigation, remanding a suit which has not been properly tried, staying the drawing up of the Court's own order, suspending the operation of the Court's order, staying proceedings pending an appeal in a guardianship matter and appointing a temporary guardian *ad interim*, applying the principle of *res judicata* to execution proceedings for the sake of finality, punishing contempt of Court committed when the Court is not sitting, deciding questions of jurisdiction though the Court is ultimately found not to have jurisdiction over the suit, directing a party who has applied for leave to appeal to His Majesty in Council to pay costs on the dismissal of his application, amending decrees or orders, granting restitution in cases of reversal of execution sales and orders in execution proceedings, restraining by injunction a person from proceeding with a suit in the Small Cause Court, staying proceedings pursuant to its own order in view of an intended appeal, and treating an application for revision as an appeal and *vice versa*: *Mahomed Wahiduddin v. Hakimn* (1), *Tara Pado Ghose v. Kamini Dassi* (2), *Mahadeo v. Budhai Ram* (3), *Gajju v. King Emperor* (4). Let me examine the matter before us in the light of this principle. The decree-holders contend that the Court is not competent to grant a stay because no appeal or application for leave to appeal is pending here or elsewhere. This argument is based on the assumption that the Court

(1) (1898) I. L. R. 25 Calc. 757.

(3) (1904) I. L. R. 26 All. 358.

(2) (1901) I. L. R. 29 Calc. 644.

(4) (1905) 2 All. L. J. 173.

has authority to grant a stay, only when an appeal or an application for leave to appeal is pending. The assumption is groundless and is negatived by Order XLI, rule 5(2) of the Code of 1908, which expressly recognises the position that an Original Court may, for a limited time, stay proceedings in execution of its own decree, in view of a possible appeal to a superior tribunal. The principle thus recognised by the legislature in express terms, furnishes, in my opinion, a useful guidance in the determination of the question, how the inherent power of this Court should be exercised in a matter of this description. That the Court has inherent power to stay proceedings pursuant to its own order in view of an intended appeal, even though there is no express statutory provision in that behalf, is conclusively shown by the case of *Bri Coomaree v. Ramrick Dass* (1). This is one aspect of the matter. Another point of view is of equal, if not greater, importance. The Judicial Committee have laid down in *Nityamoni Dasi v. Madhu Sudan Sen* (2) that as soon as an appeal has been admitted by the special leave of His Majesty in Council, the High Court is vested with authority to stay execution, in the same manner as if leave to appeal had been granted by the High Court itself. Consequently, if the proposed application by the petitioners for special leave to appeal to His Majesty in Council is granted by the Judicial Committee, this Court will be competent to stay proceedings under the authority of the decision just mentioned. The Court, therefore, ought now to act in aid of a possible order for stay that may hereafter have to be made. If the contrary view is taken, what is the result? Assume that the present application for stay is refused, and the decree-holders permitted to sell

1912

NANDA  
KISHORE  
SINGH

v.

RAM GOLAM  
SAHU.MOOKERJEE  
J.

(1) (1901) 5 C. W. N. 781.

(2) (1913) I. L. R. 38 Calc. 335 ;  
L. R., 38 I. A. 74.

1912  
 NANDA  
 KISHORE  
 SINGH  
 v.  
 RAM GOLAM  
 SAHU.  
 MOOKERJEE  
 J.

the mortgaged properties; the application for special leave is granted by the Judicial Committee and an application then made to this Court by the judgment-debtors for stay of proceedings. Are we to say that our action has already been paralysed, that we are powerless to grant relief and that the application is infructuous? I am strongly of opinion, after most anxious consideration of the subject, that the Court should not tolerate such a result, and, as I have shown, the position may be avoided by the recognition of sound judicial principles. The decree now under execution was made by this Court, and the Court has control over it, so as to enable the Court to stay proceedings in view of a possible appeal to His Majesty in Council. It is fairly obvious that if the contention of the decree-holders were to prevail, the gravest injustice might be done to litigants. An application to the Judicial Committee for special leave to appeal to His Majesty in Council must necessarily take time; distance cannot be annihilated, and time must be occupied, in spite of the utmost expedition, in the preparation and transmission of papers. Besides, their Lordships of the Judicial Committee do not hold their sittings continuously throughout the year, and weeks may elapse before the most diligent of suitors is able to obtain special leave to appeal to His Majesty in Council; if meanwhile his properties are allowed to be sold up by the decree-holders on the theory that this Court is powerless to interfere, not only may an application for stay after the grant of the special leave, as contemplated by the Judicial Committee in *Nityamoni Dasi v. Madhu Sudan Sen* (1), become infructuous, but the appeal admitted by special leave of their Lordships of the Judicial Committee may turn out to be wholly illusory and ineffectual.

(1) (1911) I. L. R. 38 Cal. 335; L. R. 38 I. A. 74.

It cannot seriously be maintained that the grant of a stay in any way throws doubt on the decree or weakens its effect; the stay is granted on the principle that the parties should, if the circumstances justify the adoption of such a course, be retained in *statu quo* till the validity of the decree has been tested in the Court of ultimate appeal. The exercise of the inherent power of the Court should thus be widened to aid the administration of justice and not unduly restricted so as to cause needless hardship to litigants and a possible failure of justice. I hold, therefore, that this Court has authority to grant this application. The stay, however, can be granted only for a limited time and on terms. The Rule, in my opinion, should be made absolute and execution proceedings stayed till the 30th November 1912; and the Court below directed to value the mortgage properties and the judgment-debtors called upon to furnish security for so much of the judgment debt as may exceed the value so determined; if security is not furnished within a time to be prescribed by the Court below, the decree-holders will be entitled to proceed with execution of their decree.

The Rule is made absolute on these terms under clause 36 of the Letters Patent, but there will be no order as to costs.

HOLMWOOD J. I am not prepared to differ from my learned brother upon the general point he makes that this Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. But there are numberless cases where the parties come to this Court asking for a relief which it is not competent for them to seek, and the Court does not in practice make use of its inherent powers to extend a

1912

---

 NANDA  
KISHORE  
SINGH

v.

 RAM GOLAM  
SAHU.
 

---

 MOOKERJEE  
J.

1912

NANDA  
KISHORE  
SINGH

v.

RAM GOLAM  
SAHU.HOLMWOOD  
J.

procedure which does not apply to a particular case to such a case. For instance the Court does not ordinarily allow an application for revision to be treated as an appeal, far less does the Court go outside its own walls to deal with parties who have no pending litigation before it.

To my mind the use of the inherent power in this case would be an abuse of the process of the Court.

Here is a case of a mortgage suit valued at less than Rs. 10,000, which was dismissed in the Court of first instance but decreed on appeal to this Court on the 16th February, 1911. The defendants applied to this Court for leave to appeal to His Majesty in Council. This application was refused on the 19th March 1912 and the suit being of less value than Rs. 10,000 admittedly it must be assumed that the Bench dealing with Privy Council matters held after full consideration that no substantial point of law arose in the case. The decree of this Court of the 16th February, 1911, is, therefore, *res judicata* between the parties and we cannot go into the merits of the case and say that this is a case where a stay of execution should be granted.

The parties are not properly before the Court and I do not think they have any right to come before the Court. Their only remedy is to go to the Judicial Committee for special leave to appeal to His Majesty in Council. Until they do this they have no footing whatever for further litigation in this matter.

There is no question of using our inherent powers to right a wrong or to prevent the abuse of the process of this Court. We are bound to hold that the decree of this Court of the 16th February 1911 which under the rules is not obnoxious to appeal to the Judicial Committee is a good and just decree and one which ought to be executed.

That is the view I am prepared to hold since in my opinion the applicants for special leave to the Privy Council are not entitled to be heard to the contrary. They are barred by the principle of *res judicata* and speaking for myself I am not prepared to hold that the decree of 16th February 1911 was not a good and just decree and was not final as far as this Court is concerned. It is to my mind clear that it cannot be a proper use of the inherent powers of this Court to impede the execution of the final decrees of this Court and I do not see why this Court should not use its inherent powers to help the decree-holder who has obtained a good decree rather than help the judgment-debtor who has no *locus standi* to delay the course of justice.

I am strongly averse to staying execution where the law does not expressly authorise it except on very good grounds shown to the satisfaction of the Court.

I have never been able to see why the interests of the decree-holder should not be just as worthy of consideration as those of the judgment-debtor and I do not feel myself either called upon to interfere or justified in interfering with a perfectly competent, good and just proceeding in execution.

As the rule is to be made absolute I may say that the applicant to the Privy Council has practically gained all he wanted by this application and I can see no objection to adjourning the matter to the 30th November which is the practical effect of the order with the additional advantage to the decree-holder of the security order.

O. M.

*Rule absolute.*

1912

NANDA  
KISHORE  
SINGH  
v.

RAM GOLAM  
SAHU.

HOLMWOOD  
J.

## PRIVY COUNCIL.

P.C.<sup>3</sup>  
1913

June 19, 20,  
23 ;  
July 11.

RAMKISHORE KEDARNATH

v.

JAINARAYAN RAMRACHHPAL

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER,  
CENTRAL PROVINCES.]

*Hindu Law—Alienation—Alienation by father in favour of adopted son in family whose adoption alleged to be illegal—Form of suit—Suit for partition in case of stranger in Hindu family—Inaction and acquiescence of father of joint family, how far binding on sons—Limitation—Minority—Form of decree.*

IN a suit instituted in 1907 by members of a Hindu joint family governed by the Mitakshara law to set aside their father's alienation of ancestral property, against the assignee, the first respondent, the father being made a *pro forma* defendant, the appellants alleged that their father improperly made in 1898 a disposition of a specific portion of the property to the respondent who had been adopted by the widow of one of two brothers (with the consent of the other) from whom their father (the adopted son of the other brother) inherited the family property; and they contended that the adoption of the first respondent was invalid for various reasons, and that they were entitled to recover the property alienated. The defence, so far as material, was that the appellants were bound by the acquiescence of their father in admitting the first respondent to the family, and that the suit was barred by limitation. The respondents also objected to the form of the suit which they contended should have been for partition. At the settlement of issues the appellants' pleader admitted "that their father had actually given possession in 1898 of the property in suit to the first respondent to enjoy it exclusively: previously, since 1887, he was living as a joint member of the family, and jointly enjoying the profits by reason of the inaction and acquiescence of the appellants' father in that mode of enjoyment." The suit was decided without evidence on that admission, and on the allegations in the plaint and written statements, and was dismissed, and that decree was affirmed on appeal.

\* *Present*: LORD ATKINSON, LORD PARKER, SIR SAMUEL GRIFFITH, SIR JOHN EDGE AND MR. AMEER ALL.

*Held*, as to the form of suit, that to deny any relief except in a suit for partition would be to deny the right to relief altogether, since the basis of the claim was that the appellants were entitled to the estate as a joint and undivided estate, and desired to enjoy it as such. Also it might be that the first respondent was entitled to stand in the shoes of the appellants' father as to the share which would come to the latter on a partition; and if he established such a position, the Court would at the instance of the respondent decree a partition between the appellants and their father. Without therefore expressing any opinion as to its validity in law or fact their Lordships thought that, on the pleadings, it was open to the first respondent to set up such a case.

*Held*, also, that though a partition made by a Hindu father may under some circumstances bind his minor sons [as in *Balkishen Das v. Ram Narain Sahu* (1)] yet if on the partition a share is given to an absolute stranger (as the first respondent would be if his adoption were invalid) the partition may be impeached as a disposition of property made without consideration unless it can be supported as a *bona fide* compromise of a disputed claim. If, therefore, the adoption of the first respondent were wholly invalid the appellants were entitled to succeed in the absence of any other defence.

The Appellate Court as to limitation had decided that the suit was not barred as against the first appellant, but only as against the rest of the appellants who were minors, and had not been born at the time (1887) when it was alleged the adverse possession began to run. *Held*, that if the first appellant was entitled to relief the other appellants would also be so entitled.

Under the circumstances, their Lordships, in allowing the appeal, were of opinion that they could not, on the materials before them finally determine the rights of the parties, and remanded the case for trial with a declaration that it was competent to the Court, in the event of the first respondent failing in his other defences to make the whole or any part of the relief granted to the appellants conditional on their assenting to a partition so far as regarded the father's interest in the estate, so as to give effect to any right to which the first respondent might be entitled claiming through his assignor.

APPEAL from the decree and judgment (26th July 1909) of the Court of the Judicial Commissioner, Central Provinces, which confirmed the decree (1st September 1908) of the District Judge of Wardha.

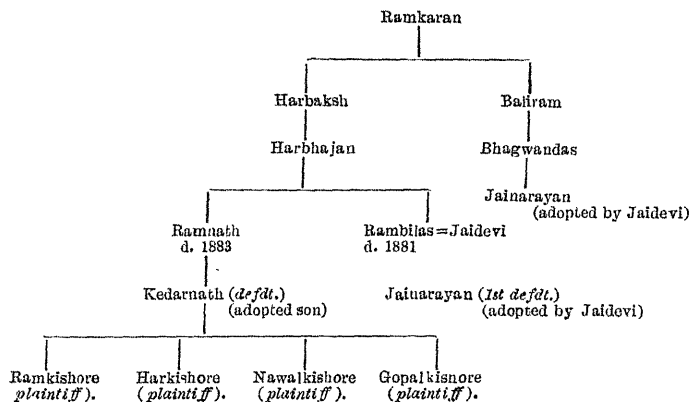


1913  
 RAMKISHORE  
 KEDARNATH  
*v.*  
 JAINARAYAN  
 RAMRACHH-  
 PAL.

The plaintiffs were the appellants to His Majesty in Council.

The suit out of which this appeal arose was instituted on 20th December 1907 by the plaintiffs as members of a joint Hindu family governed by the Mitakshara Law, to set aside an alienation by their father of what they alleged to be ancestral property of the family.

The following pedigree, which was admitted except with regard to the adoption of Jainarayan (the first defendant, now the first respondent), explains the position and relationship of the various parties :—



It was alleged in the plaint that the property in suit was acquired by Harbhajan and his two sons, Ramnath and Rambilas, the sons succeeding to it and remaining joint during their lives. On the death in 1881 of Rambilas the whole property was in the possession of Ramnath, but out of respect for Jaidevi Bai, his brother's widow, he allowed mutation of names in respect of Rambilas' 8-anna share to be effected in her name in the Collectorate. On the death of Ramnath in 1883 his adopted son, Kedarnath, defendant No. 14 succeeded to the entire estate. In October 1887, Jaidevi Bai set up Jainarayan, defendant No. 1,

whom she had brought from the Panjab in 1886 as her adopted son and in November 1888 she applied to the Collector for substitution of his name on the Registers in place of her own with the result that Jainarayan's name was so entered on 1st March 1889, he being described as the son of Rambilas. The plaintiffs denied that Jainarayan had ever been adopted by Jaidevi Bai, and contended that the adoption, if it had ever taken place, was invalid for various reasons, namely, that he was an orphan and could not be given in adoption by anyone, that he had been married before the alleged adoption, that he was the only son of his parents, and that Jaidevi Bai had no authority from her husband to adopt. Jainarayan had no right to the family property sued for; and Jaidevi Bai was only entitled to maintenance: she died on 25th June 1897.

The four plaintiffs were the sons of Kedarnath; and at the time of the filing of the suit were, according to the plaint, born Ramkishore on 20th December 1886, that is, prior to the date of the alleged adoption of Jainarayan, and the other three on 21st July 1890, 13th December 1892, and 15th March 1894, that is all subsequently to the alleged adoption. The relief claimed was "that each of the defendants may be ordered to deliver them the possession of whatever property he has with him" out of the property sued for.

There were originally fourteen defendants, but the only defendants against whom the appeal was now pressed, as respondents were Jainarayan, defendant No. 1, Bapurao, defendant No. 12, who was an alienee of part of the property, and Kedarnath, defendant No. 14.

The defences raised, so far as they are now material, were that the plaintiffs were bound by the

1913  
 RAMKISHORE  
 KEDARNATH  
 v.  
 JAINARAYAN  
 RAMRACHIPAL.

1913

RAMKISHORE  
KEDARNATH  
v.  
JAINARAYAN  
RAMRACHH-  
PAL.

acquiescence of their father in admitting Jainarayan to the family, and in allowing him to continue to remain a member of it; and that the suit was barred by limitation. The defendants also objected to the form of the suit, which they contended should have been one for partition. At the settlement of issues before the Court of first instance, the plaintiffs' pleader admitted that the plaintiffs' father had actually given possession in 1898 of the property in suit to the first defendant to enjoy it exclusively. Previously, since 1887, he was living as a joint member of the family, and jointly enjoying the profits by reason of the inaction and acquiescence of plaintiffs' father in that mode of enjoyment."

The issues material on this appeal were "(i) whether the plaintiffs can maintain this suit in the present form without suing for partition? (ii) are plaintiffs bound by the acquiescence of their father in admitting defendant No. 1 into the family, and allowing him a share in the property? and (iii) since defendant No. 1 has been in joint possession of the property with Kedarnath since 1887, and in separate possession of his share since 1897—1898, has he acquired an absolute title to the property in dispute? If plaintiffs' father's claim is time-barred has their claim become time-barred also?"

The case was decided without evidence on the admission of the pleader and the allegations in the plaint and written statement; and the main question on this appeal was whether it had been rightly so decided.

The District Judge held on the first issue that the plaintiffs could maintain the suit without suing for partition. On the second issue he found that the plaintiffs were bound by the acquiescence of their father; and he was also of opinion that what had been

done was in the nature of a family arrangement by which the plaintiffs would be estopped from disputing the validity of the adoption of defendant No. 1. On the third issue he held that the plaintiffs' claim was barred by the adverse possession of the defendant No. 1 for more than 12 years.

The District Judge accordingly dismissed the suit. The plaintiffs appealed from that decision to the Court of the Judicial Commissioner, and the appeal came before the Additional Judicial Commissioner (MR. J. A. C. SKINNER) who held that the possession of the defendant No. 1 had been adverse to the plaintiffs since 1887, and that the claim of the second, third, and fourth plaintiffs who were not then born was barred by limitation; but that the claim of the first plaintiff, if he was correct in stating that he was born on 20th December, 1886, and therefore prior to the period when the adverse possession of defendant No. 1 commenced to run, was saved by the provisions of section 7 of the Limitation Act (XV of 1877). The Additional Judicial Commissioner, however, decided the case against plaintiff No. 1 on the ground that the acts of the plaintiffs' father in admitting the defendant Jainarayan to a joint enjoyment of the family property and in coming to a partition with him were binding upon the plaintiffs, whether that defendant's adoption was in fact valid or not. On this point he said:—

"The question whether the plaintiff Ramkishore is bound by his father's acquiescence in Jainarayan's joint enjoyment of the family property, and consent to a partition with him depends on whether Kedarnath is held to have acted in a personal or a representative capacity."

And, after referring to the authorities cited on either side, he concluded his judgment thus:—

"In my own experience partitions constantly occur, in which one or both of the dividing parties contains minor children who are represented by their fathers, and remain joint with them. It would be most undesirable

1913

RAMKISHORE  
KEDARNATH  
v.  
JAINARAYAN  
RAMRACHH-  
PAL.

1913

RAMKISHORE  
KEDARNATH  
v.  
JAINARAYAN  
RAMRACHH-  
PAL.

that such arrangements should be liable to be challenged years after when the values of the shares have perhaps changed, or some of them have been alienated by those to whom they fell, without even alleging fraud on the part of the minor's representative. And in *Balkishen Das v. Ram Narain Sahu* (1) their Lordships of the Privy Council have recognised the right of a Hindu father to bind the interests of his minor sons by a partition subject to their being entitled by proper proceedings to set it aside as unfair or prejudicial to their interests, that is, I think, as having been to his knowledge unfair or prejudicial to them when he effected it, and not merely because to have re-opened it would be to their advantage. The plaintiffs' learned counsel admits that a *bond fide* family arrangement would be binding on his client, but contends that such an arrangement must be alleged, put in issue, and proved. I am unable to accept this contention. Either Jainarayan was Rambilas' lawfully adopted son, or he was not. If he was, the arrangement effected in 1898 was in my opinion a partition, and as such is binding on the sons of Kedarnath, one of the parties to it. If he was not, the arrangement was in the nature of a compromise of a claim either disputed or which might have been disputed. And on this view also, in the absence of any allegation of fraud or collusion, Kedarnath's action is in my opinion binding on his sons."

In the result the decree of the District Judge was confirmed, and the appeal dismissed.

On this appeal,

*De Gruyther K.C.* and *H. Mitra*, for the appellants, contended that the trial of the case by the Courts below on the allegations in the plaint and written statements and in the admission of the appellants' pleader without taking any evidence was unsatisfactory, and had resulted in a decision which, he submitted, was erroneous. The Courts below had held that the alienation of a part of the ancestral property by Kedarnath, the appellants' father, was binding on the appellants, but that is a question which could not be determined finally without proper pleading and evidence. There was nothing to show the actual nature of the transaction. The appellants did not admit that the first respondent Jainarayan or his alleged adoptive mother

(1) (1903) I. L. R. 30 Calc. 738, 752 : L. R. 30 I. A. 139, 150.

Jai Devi were ever in possession of any of the property as owners, or in any way to give them a right to a share on partition. The appellants' case as to that was stated in paragraph 10 of their plaint, namely, "All the plaintiffs and their father remained owners of the entire family property : and Jai Devi was entitled to maintenance only. She and her reputed adopted son Jainarayan began to live with the plaintiffs and their father. Jai Devi died on 25th June 1897. After this the father of the plaintiffs gave Jainarayan her reputed adopted son the following property, on 24th October 1898 for separate enjoyment, and from that very day he began to live separate and declare "I am the owner of that property." The above forms a part of the plaintiff's joint family estate. The effect of the entry of Jai Devi's name as owner of a share of the property was not to give her the right to it: see *Rewa Prasad Sukal v. Deo Dutt Ram Sukal* (1). She could not be entitled to more than maintenance. Had the procedure under section 117 of the Civil Procedure Code, 1882, been adopted the appellants would have denied that there was any partition. The admission by their pleader must be taken, it was submitted, as not meaning that Jainarayan had any title in the property, but merely that he was by the inaction and acquiescence of Kedarnath treated as a member of the family, and that on Jai Devi's death a portion of the property was given to him by Kedarnath. The case of *Balkishen Das v. Ram Narain Sahu* (2) decided that a minor had no right on attaining majority to set aside a partition unless there had been fraud, or it was prejudicial to his interest. But what the appellants complain of is that their father has made a wrongful alienation

1913

RAMKISHORE  
KEDARNATH  
v.  
JAINARAYAN  
RAMRACHH-  
PAL.

(1) (1899) I. L. R. 27 Calc. 515 : (2) (1903) I. L. R. 30 Calc. 738, 752 :  
L. R. 27 I. A. 39. L. R. 30 I. A. 139, 150.

1913  
 RAMKISHORE  
 KEDARNATH  
 v.  
 JAINARAYAN  
 RAMRACHH-  
 PAL.

without necessity or consideration of a portion of the ancestral family property in favour of a person who has no right to it, and who is in fact a stranger (there being no proof that his adoption is valid); and they want to recover the property for the joint family: they do not want partition. No compromise of a disputed claim nor any family arrangement had been either pleaded or proved in this case; and the mere passive acquiescence by their father was only a personal bar, and could not affect the appellants who had at birth obtained a vested right in the property. Reference was made to Strange's Hindu Law (Ed. 1864, Madras), page 222, Chapter IX "on Partition," and to Mayne's Hindu Law, 7th Ed., page 439, paragraph 336, as to the power of a father as manager to bind his sons. The suit was not barred by limitation as Jainarayan had no adverse possession for 12 years. The suit, so far as Ramkishore, the first appellant, was concerned, had been brought within 3 years of his attaining his majority, and he was also entitled to the benefit of section 7 of Act XV of 1877. That had been so held by the Appellate Court in India; and if that were so the other appellants, it was submitted, were not barred, but were also entitled to relief. The present suit for possession of the property was not barred by the omission of the appellants to sue to set aside the adoption of Jainarayan which was invalid, and in any case had not been proved. Reference was made to *Muhammad Umar Khan v. Muhammad Niazuddin Khan* (1).

*Lowndes*, for the 1st and 2nd respondents, contended that the transaction of 1898 had always been in the course of the case assumed to be a partition. To say the property was *given* to Jainarayan was to raise a new point which could not be done at this stage of

the case. In a recent case, *Brijrai Singh v. Sheodan Singh* (1) a document in which a father stated that he "had given separate shares" to his sons, was construed to be a partition; and the same construction, it was submitted, should be put upon the admission made by the appellants' pleader that Kedarnath "gave" the property in suit to Jainarayan. Whatever the transaction was that is sought to be set aside, no document containing it had been filed with the plaint as should have been done under sections 58 to 63 of the Civil Procedure Code, 1882. The effect of the pleader's admission, it was contended, was that the respondent Jainarayan had joint possession of the property, and the question was raised in that sense in the 3rd issue. Jainarayan's claim was in any event good as against Kedarnath, the appellants' father, and the only right of suit which the appellants could have against Jainarayan was, it was submitted, a suit for partition of the whole of the family properties: *Koer Hasmat Rai v. Sunder Das* (2). The suit in its present form was not maintainable; the form of the plaint and the relief asked for were referred to. Kedarnath having accepted the adoption of Jainarayan as valid, his acceptance was binding on his sons. The only requisite for a valid adoption in the Punjab by the customary law was notoriety of the fact that the adoptee had been treated as an adopted son. In the present case he was so treated, and his adoption should be taken to be valid. Reference was made to the recent case of *Chiman Lal v. Hari Chand* (3) which was heard by this Board. In the absence of fraud or collusion (and none was alleged in this case) the acceptance by Kedarnath of Jainarayan as a member of the joint family, and the partition with

1913

RAMKISHORE  
KEDARNATH  
v.  
JAINARAYAN  
RAMRACHH-  
PAL.

(1) (1913) I. L. R. 35 All. 337. (2) (1885) I. L. R. 11 Calc. 396, 399.

(3) (1913) I. L. R. 40 Calc. 879.



1913  
 RAMKISHORE  
 KEDARNATH  
 v.  
 JAINARAYAN  
 RAMRACHH-  
 PAL.

him of the family properties were binding on the appellants. Reference was made to Mayne's Hindu Law, 7th Ed., page 455, paragraph 346; and *Jagannath v. Mannu Lal* (1) which was decided by Sir John Edge. and represented the view of the whole current of authorities on the subject.

As to limitation, the suit was barred. Kedarnath was barred by adverse possession at the time the suit was brought; and if so his sons, the appellants were also barred: *Radhabai v. Anantrav Bhagvant Deshpande* (2); and Act XV of 1877, section 28, and Sch. II, Art. 144, were referred to.

If barred their title would be extinguished. The Court of the Judicial Commissioner had, however, held that the first appellant was entitled to the benefit of section 7 of the Limitation Act, 1877, and that only the younger appellants were barred. If he is right as regards the first appellant, the other appellants would probably then be entitled to relief also. As to whether a suit for partition of the whole property would be now barred, reference was made to the Limitation Act (IX of 1908), section 14: and as to the contention for the appellants that a suit to set aside Jainarayan's adoption was unnecessary, reference was made to *Jagadamba Chaodhrani v. Dakhina Mohun Roy Chowdhri* (3). The case had been rightly decided, and the appeal should be dismissed.

*De Gruyther K. C.* replied contending that the property had been given to Jainarayan; that the case was one of the nature described in article 126 of Schedule II of the Limitation Act, 1877; and referring to the following cases and authorities showing the form of the decree where an alienation by the father of a Hindu joint family is set aside, and the equitable

(1) (1894) I. L. R. 16 All. 231.

(3) (1886) I. L. R. 13 Cal. 308;

(2) (1885) I. L. R. 9 Bom. 198, 224.

L. R. 13 I. A. 84.

rights arising in such a case: *Madho Parshad v. Mehrban Singh* (1); *Radha Proshad Wasti v. Esuf* (2); *Naranbhai Vaghjibhai v. Ranchod Premchand* (3); Mayne's Hindu Law, 7th Ed., page 483, paragraph 365; and page 485, paragraph 366; *Rajaram Tewari v. Lachman Prasad* (4) *per* Sir Barnes Peacock, showing that all members of the joint family must be parties; *Mahabeer Persad v. Ramyad Singh* (5); *Deendyal Lal v. Jugdeep Narain Singh* (6); *Hardi Narain Sahu v. Ruder Perakash Misser* (7); and *Koer Hasmat Rai v. Sunder Das* (8). The question of limitation was different in the case of the father, from what it is in the case of the sons, and therefore it depends to some extent on whether the acts of the father are binding on the sons; that is, it is really not a question of limitation at all. The main question was whether this Board is satisfied that there has been a fair and proper trial of this case, and if not, whether the suit should be now dismissed, or sent back to be retried by the Courts in India. The latter course should, it was submitted, be adopted.

1913  
RAMKISHORE  
KEDARNATH  
v.  
JAINARAYAN  
RAMRACHH-  
PAL.

The judgment of their Lordships was delivered by

SIR SAMUEL GRIFFITH. This was a suit instituted—to use the words of Art. 126 of Schedule 2 to the Indian Limitations Act of 1877—“by a Hindu governed by the law of the Mitakshara, to set aside his father's alienation of ancestral property.”

July 11.

The plaintiffs, the appellants, are the four sons of the defendant Kedarnath. The defendants are one

- |                                       |  |
|---------------------------------------|--|
| (1) (1890) I. L. R. 18 Calc. 157 :    | (5) (1873) 12 B. L. R. 90 :            |
| L. R. 17 I. A. 194.                   | 20 W. R. 192.                          |
| (2) (1881) I. L. R. 7 Calc. 414.      | (6) (1877) I. L. R. 3 Calc. 198 :      |
| (3) (1901) I. L. R. 26 Bom. 141, 145. | L. R. 4 I. A. 247.                     |
| (4) (1869) 4 B. L. R. A. C. 118 :     | (7) (1883) I. L. R. 10 Calc. 626, 636: |
| 12 W. R. 478.                         | L. R. 11 I. A. 26, 30.                 |
| (8) (1885) I. L. R. 11 Calc. 396.     |  |

1913

RAMKISHORE  
KEDARNATH

v.

JAINARAYAN  
RAMRACHH-  
PAL.

Jainarayan, Kedarnath, and certain assignees from the former. The case made by the plaint, so far as material to the present appeal is that the plaintiffs and their father were the owners of a joint undivided ancestral estate subject to the Mitakshara law, and that Kedarnath, in October 1898, improperly made a disposition of part of it by way of partition to the defendant Jainarayan. The relief formally claimed was that "each of the defendants may be ordered to deliver them the possession of whatever property he has with him out of that mentioned in paragraph 11," with consequential relief.

The suit was instituted on 20th December 1907. The first plaintiff was alleged to have been born on 20th December 1886, the other plaintiffs being younger. The plaintiffs alleged that the estate had descended to two brothers, Ramnath and Rambilas, neither of whom had issue, that in 1877 the former adopted the defendant Kedarnath, that Rambilas died in 1881 and Ramnath in 1883, whereupon Kedarnath became solely entitled, that about 1886 or 1887 the widow of Rambilas, whose name had previously, with the consent of Ramnath, been entered in the local register as a joint owner in place of Rambilas, adopted Jainarayan as the son of Rambilas, and that his name was thereupon entered as owner in her place, that the adoption of Jainarayan was invalid for various reasons stated, and that in 1898 Kedarnath "gave" a specific part of the estate to Jainarayan, who has since claimed and enjoyed the separate possession of it. Under these circumstances, the plaintiffs claimed restitution of the part so given.

Amongst other defences, Jainarayan set up that the plaintiffs are bound by the acquiescence of their father Kedarnath in the admission of Jainarayan to the family, and that the suit is barred by the Limitations Act.

In proceedings before the District Judge for the purpose of settling preliminary issues of law, the plaintiffs' pleader admitted that "plaintiffs' father had actually given possession of the property in suit to defendant No. 1 (Jainarayan) to enjoy it exclusively by himself in 1898. Previously he was living as a joint member and jointly enjoying the property by reason of plaintiffs' father's inaction and acquiescence in this mode of enjoyment." The case was decided in the Courts below upon the allegations in the plaint, together with this admission. The first three issues were finally settled as follows :—

1913  
RAMKISHORE  
KEDARNATH  
v.  
JAINARAYAN  
RAMRACHH-  
PAL.

1. Whether plaintiffs can maintain the suit in its present form without suing for partition?

2. Are plaintiffs bound by the acquiescence of their father in admitting defendant No. 1 into the family and allowing him a share in the property?

3. Since defendant No. 1 has been in joint possession of property with Kedarnath since 1887 and in separate possession of his share since 1897-98, has he acquired an absolute title to the property in dispute? If plaintiffs' father's claim is time-barred, has their claim become time-barred also?

There was some controversy as to the effect of the admission already stated. But their Lordships think that, as the issues were settled in presence of the parties, it must be construed in the sense recited in the third issue. The learned Judge of first instance answered the first and second issues in the affirmative, and as to the third issue held that the defendant Jainarayan had acquired an absolute title to the property in suit by adverse possession for more than 12 years.

On appeal to the Court of the Judicial Commissioner, the learned Additional Commissioner held that as the first plaintiff had instituted the suit within

1913  
 RAMKISHORE  
 KEDARNATH  
 v.  
 JAINARAYAN  
 RAMRACHH-  
 PAL.

three years of attaining the age of 21, he was entitled to the benefit of Section 7 of the Limitations Act of 1877 and the suit was not barred as against him, but he held that it was barred as against his younger brothers, who were born after the commencement of what he regarded as the adverse possession of the defendant Jainarayan. It was, however, conceded before this Board, and, as their Lordships think, rightly conceded, that if the first plaintiff succeeds in the suit his younger brothers born before a partition of the estate ~~will be entitled to share in the~~ relief.

The learned Additional Commissioner also held that the first plaintiff was bound by his father Kedar-nath's acquiescence in Jainarayan's joint enjoyment of the family property and consent to a partition with him, since in such acquiescence and consent he must be held to have acted in a representative and not in a personal capacity.

The basis of the suit is that the adoption of Jainarayan was wholly invalid, in which case he was in the view of the law an absolute stranger. It is not disputed that the validity of an adoption may be contested by persons prejudicially affected by it. And it seems to their Lordships to be clear that, although a partition made by a Hindu father may under some circumstances bind his minor sons, as was held by this Board in *Balkishen Das v. Ram Narain Sahu*(1), yet if on the partition a share is given to an absolute stranger the partition may be impeached as a disposition of property made without consideration, unless it can be supported as a *bond fide* compromise of a disputed claim. There are no materials before the Board to enable them to form a conclusion in favour of the respondent on this ground, as suggested by the

(1) (1903) I. L. R. 30 Calc. 738, 752 : L. R. 30 I. A. 139, 150.

learned Additional Judicial Commissioner, even if such a case had been set up by him.

Their Lordships are therefore of opinion that if the adoption of Jainarayan was wholly invalid the plaintiffs would be entitled to succeed in the absence of any other defence.

1913  
RAMKISHORE  
KEDARNATH  
v.  
JAINARAYAN  
RAMRACHH-  
PAL.

With respect to the form of suit, it was rightly pointed out by the learned counsel for the appellants that to deny any relief except in a suit for partition would be to deny the right of relief altogether, since the basis of their claim is that they are still entitled to the estate as a joint undivided estate, and desire to enjoy it as such. It may well be, however, that, as between Kedarnath and Jainarayan, the latter may be entitled to insist that he stands in the shoes of the former as to the share which would come to Kedarnath upon a partition; and that the Court, if that position were established, would itself, at Jainarayan's instance, decree a partition as between the plaintiffs on the one hand and Kedarnath on the other. Their Lordships think that on the present pleadings it is open to Jainarayan to set up such a case, but express no opinion as to its validity either in law or fact.

Under these circumstances, their Lordships, being of opinion that they cannot, on the materials before them, finally determine the rights of the parties, will humbly advise His Majesty to set aside the judgments and decrees appealed from, and remand the suit for trial, with a declaration that it is competent for the Court, in the event of the respondent Jainarayan failing in his other defences, to make the whole or any part of the relief granted to the plaintiffs conditional on their assenting to a partition so far as regards Kedarnath's interests in the estate, so as to give effect to any right to which the respondent may be entitled claiming through Kedarnath.

1913

RAMKISHORE  
KEDARNATH  
".  
JAINARAYAN  
RAMRACHH-  
PAL.

The respondents must pay the costs of the hearing on the preliminary issues in the District Court, and the costs of the appeal to the Judicial Commissioner, but there will be no order as to the costs of this appeal.

*Appeal allowed and case remanded.*

Solicitor for the appellants : *Edward Dalyado.*

Solicitors for the respondents : *T. L. Wilson & Co.*  
J. V. W.

### CIMINAL REVISION.

*Before Harington and Coxe JJ.*

1913

*April 10*

BASANTA KUMARI DASÍ

*v.*

MAHESH CHANDRA LAHA.\*

*Dispute concerning land—Ijmali property—Claim by co-sharers to exclusive possession of specific plots—Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898), s. 145.*

A Magistrate has jurisdiction, under s. 145 of the Criminal Procedure Code, in the case of *ijmali* land, where each party claims to be in exclusive possession of specific portions of the same.

Under s. 145 the question for the Magistrate's decision is not whether the parties have a title to possession jointly, or a title to possession separately, but whether either of them is in actual possession. Co-sharers in an *ijmali* estate may by express or tacit arrangement be each separately in actual possession of specific or demarcated portions of the same, and s. 145 applies to such a case.

When, however, the parties are found to be not constructively but actually in joint possession, the section has no application.

\* Criminal Revision No. 58 of 1913, against the order of L. B. Dass, Deputy Magistrate of Dacca, dated Dec. 2, 1912.

*Makhan Lal Roy v. Barada Kanta Roy* (1) explained and distinguished.

*Per* HARRINGTON J. Where a party alleges exclusive possession and acquiesces in the hearing of the case on that footing, he cannot afterwards be heard to say that the whole proceedings are bad because the land is *ijmali*.

1913

BASANTA  
KUMARI  
DASI  
v.  
MAHESH  
CHANDRA  
LAHA.

On the report of the Sub-Inspector of thana Shabhar, the Additional District Magistrate of Dacca drew up a proceeding under s. 145 of the Criminal Procedure Code, on the 30th August, 1912, between Mohesh Chandra Laha and others as the first, and Basanta Kumari Dasi as the second, party. It appeared that the parties were members of a wealthy family in the district, consisting of three branches, living in the family dwelling house, each, however, occupying specific portions thereof. In the zenana quarters there were two small plots of open space generally used for storing fuel and for other domestic purposes, and each party claimed to be in exclusive possession of the same. On the 11th September the case was transferred to Babu L. B. Dass, Deputy Magistrate of Dacca, who, after holding an enquiry, declared the first party to be entitled to the possession of the two plots until evicted therefrom in due course of law, and ordered possession to be delivered to him accordingly. The second party thereupon moved the High Court and obtained the present Rule.

*Babu Harendra Narayan Mitter* (with him *Babu Bhudeb Chandra Roy*), in support of the rule. The parties are undivided members of a Hindu joint family and live in their joint family house. The disputed plots are contained in the compound of the dwelling house. Each party is entitled to joint possession of these plots and s. 145 does not apply: *Makhan Lal*



1913  
 BASANTA  
 KUMARI  
 DAS  
 v.  
 MAHESH  
 CHANDRA  
 LAHA.

*Roy v. Barada Kanta Roy* (1). The words "evicted" in clause (6) of s. 145 and "ousted" in Schedule V, Form XXII are not applicable to *ijmali* property. The parties having joint rights the one cannot bring a suit to eject the other.

*Mr. P. L. Roy* (with him *Babu Atulya Charan Bose* and *Babu Ramani Mohan Chatterjee*), showed cause. The case cited is distinguishable. The Magistrate has to enquire only into the fact of "*actual* possession," irrespective of the rights of the parties to possession: If co-sharers are in actual possession of specific portions of *ijmali* land, the Magistrate has jurisdiction under the section: *Guru Das Kundu Chowdhry v. Kedar Nath Kundu Chowdhry* (2).

*Cur. adv. vult.*

HARINGTON J. This Rule was issued at the instance of the second party in a proceeding under section 145 calling upon the District Magistrate and the opposite party to show cause why the order made under that section should not be set aside having regard to the case of *Makhan Lal Roy v. Barada Kanta Roy* (1).

The facts are that the first and second party are members of the same family and reside in the *ijmali* family dwelling house, each occupying a specific portion of the house.

The dispute which has given rise to a likelihood of a breach of the peace relates to two plots, Nos. 1 and 2, which are within the premises, and are bounded as shown in the proceedings.

Each party claims to be in possession of the plots in dispute to the exclusion of the other.

For the petitioner it is contended on the authority of *Makhan Lal Roy v. Barada Kanta Roy* (1), that,

(1) (1906) 11 C. W. N. 512.

(2) (1911) I. L. R. 38 Cal. 889.

as the land is *imali*, no order can be made under section 145.

For the respondent it is argued that an order can be made under the section, if it be found that either party is in actual possession of the disputed plots, whether the land is *imali* or not.

The case relied on by the petitioner was one which related to a dispute as to some huts which had been erected on land in the joint possession of the parties. The huts had been recently built. The judgment can be supported on the ground that the Court has found that the huts were built on land which was not in the exclusive possession of either party. If that be so, and the huts were not in possession of either party to the exclusion of the other, the order under section 145 could not be made.

I am not prepared to hold that the decision involves the wider proposition contended for by the learned vakil for the petitioner. No doubt there are expressions in the judgment which support the proposition, but it is not necessary as a ground for the decision.

The learned vakil argued that the section was only applicable where the parties had conflicting titles to the land in dispute, and that sub-section (6) providing that the party in possession was to retain possession until "evicted" in due course of law was conclusive to show that no order could be made when the parties to the dispute were jointly entitled to the land, as one joint tenant could not evict another; the party out of possession, therefore, would be for ever debarred from getting possession of the land to which he was entitled jointly with the other party.

In my opinion this argument is a fallacious one. No doubt the party out of possession could not maintain ejectment against his co-owner in possession. If

1913

BASANTA  
KUMARI  
DASI  
v.  
MAHESH  
CHANDRA  
LAHA.

HARRINGTON  
J.

1913

BASANTA

KUMARI

DASI

v.

MAMESH

CHANDRA

LAHA.

HARRINGTON

J.

he sued claiming a declaration of his title and joint possession, and obtained a decree, he would not under that decree be able to evict the other party. But if he sued for partition, established his title to a share of the property in dispute, got his share partitioned by metes and bounds and adjudged to him, that would, in my opinion, amount to an eviction of the other party in due course of law from that portion of the lands in dispute to which the plaintiff was found entitled.

It is a fallacy, therefore, to say that sub-section (6) makes it impossible to apply section 145 in cases where the parties are jointly entitled to the land because a joint owner out of possession cannot evict a joint owner in possession. He can evict him from his share of the lands, not by a suit in ejectment but by a suit for partition.

I am disposed to think that sub-section (6) was purposely drafted, as it is, so as to make it impossible for a joint owner out of possession to get put in under a decree giving him joint possession, as such a proceeding would most probably bring about the very breach of the peace which section 145 is designed to prevent.

On reading the terms of section 145 I think it is clear that the question whether the parties have a title to possession jointly, or have a title to possession separately, cannot be considered. Under sub-section (1) the Magistrate is to call on the parties to put in their claim "as respects the fact of actual possession", and the Magistrate, without reference to the claims of such parties to a right to possess the subject in dispute . . . shall . . . if possible, decide whether any and which of the parties was at the date of the order "in such possession of the said subject." "Such possession" can only mean the "actual possession" referred to in sub-section (1).

The question for the Magistrate is, therefore, actual possession, and actual possession only. Co-sharers in an estate may by express or tacit arrangement be each separately in actual possession of specified and demarcated portions of the estate. What is there then to prevent the application of the section? How can the question whether the land is *ijmali* or partitioned affect the question, who is in actual possession of it? Take a hypothetical case: Suppose A and B are jointly entitled to possession of a defined plot of ground. A alleges he is in possession to the exclusion of B. B alleges he is in possession. They are entitled to joint possession: if the Magistrate finds that both A and B are actually enjoying the joint possession to which they are entitled, then, of course, he cannot make an order under section 145 in favour of one against the other; but if he finds that one is in actual possession and the other not in possession, I cannot see why he should not make an order under section 145. There is nothing in the form of the order given in Schedule V, Form XXII, rendering it inapplicable.

In short, in my view, the question whether the parties have a joint title to the land is one which the Magistrate cannot investigate under section 145. The only question for him is whether either party has actual possession, and if he finds that one party has actual possession of a defined area, and the other party has not, he can make an order irrespective of the titles of the parties. In my opinion, therefore, the circumstance that the lands were *ijmali* does not affect the case.

There is another reason why this ground should not be allowed to prevail. The objection was not taken by the petitioner at the outset. Having alleged an exclusive possession, and acquiesced in the

1913

BASANTA  
KUMARI  
DASI  
v.  
MAHESH  
CHANDRA  
LAHA.

HARRINGTON  
J.

1913

BASANTA  
KUMARI  
DASIv.  
MAHESH  
CHANDRA  
LAHA.HARRINGTON  
J.

hearing of the case on that footing, she cannot now be heard to say that the whole proceedings were bad because the land is *ijmali*.

But notwithstanding my view on the points argued, I felt at first some difficulty in maintaining the order. The Magistrate has contrived to word it in such a way as to look as though he had considered title to possession, instead of actual possession. But a perusal of the body of the judgment shows that he directed his mind to the fact of actual possession: he finds in express terms actual possession, and that is sufficient, notwithstanding the somewhat unfortunate wording of the last paragraph.

The Magistrate's attention is directed to Schedule V, Form XXII, which shows how an order ought to run.

The Rule must be discharged.

COXE J. This was a Rule to show cause why an order under section 145 of the Criminal Procedure Code should not be set aside having regard to the decision in the case of *Mukhan Lal Roy v. Barada Kanta Roy* (1).

So far as the facts alone are concerned, this case and the case cited seem to me indistinguishable. In both cases it was common ground between the parties, and it was found by the Magistrate that the lands in dispute were not in the joint possession of the parties. In both cases, however, it was found that the land in dispute belonged to the family dwelling house of the parties, and in the case cited the learned Judges held that section 145 did not apply to such a case. Perhaps I may say, as one of the Judges that issued this Rule, that we granted it in order that the case cited might be carefully reconsidered.

Its importance is beyond question, as no property is so apt to occasion a breach of the peace as the property of an undivided or incompletely divided family.

Now, I fully agree that when property is found as a fact to be, not constructively, but actually in the joint possession of the parties, the section cannot apply. An order for joint possession would obviously rather encourage than prevent a breach of the peace. But when it is found that the property as a fact is not actually in joint possession, it appears to me immaterial whether the parties have a joint title to it or not. The case cited, however, can in my opinion be distinguished because the learned Judges in that case found distinctly that the parties were in joint possession. Speaking with the utmost respect, I cannot agree that this Court was entitled under the Charter to arrive at that finding in opposition to the finding of fact of the Magistrate and the pleadings of the parties, or indeed in opposition to the finding of the Magistrate alone. But having arrived at that finding the rest of the decision was inevitable.

It has been argued that the use of the word "evicted" in the last sub-section of section 145, and of the word "ousted" in Form XXII, shows that the section was not intended to apply to property to which the parties had a joint title, inasmuch as in such a case the remedy of the defeated party would be a suit, not for eviction, but for joint possession. My learned brother has pointed out that this does not necessarily follow, and has explained the introduction of the word "evicted" into the section. Unless this explanation is accepted, it appears to me that we are forced to the conclusion that the use of the words "evicted" and "ousted" must be a mere oversight in drafting. It must be admitted that so slight a slip might be made. On the other hand, it is inconceivable that the

1913

BASANTA  
KUMARI  
DASI  
v.

MAHESH  
CHANDRA  
LAHA.

COXE J.

1913  
 BASANTA  
 KUMARI  
 DASI  
 v.  
 MAHESH  
 CHANDRA  
 LAHA.

Legislature really intended to exclude from the operation of section 145 the very property which is most prolific of disputes leading to a breach of the peace. I agree, therefore, to discharge the Rule.

E. H. M.

*Rule discharged.*

### CRIMINAL REVISION.

*Before Imam and Chapman JJ.*

1913  
 April 30.

SHEWDHAR SUKUL

v.

EMPEROR\*.

*Dishonestly receiving stolen property—Receipt of property—Production of the railway receipt, payment of freight and taking of formal delivery—Property not actually removed, or attempted to be removed, from railway premises—Penal Code (Act XLV of 1860), s. 411.*

Where the consignee presented a railway receipt for certain stolen goods to the station-master, paid the freight and received formal delivery of the package from the latter :

*Held*, that the goods had come to be not merely in the potential possession of the consignee, but actually within his power and unrestricted control, though he had not removed them from the station where they were then lying, nor made any attempt to do so, and that he had received them within s. 411 of the Penal Code.

*Reg. v. Hill* (1) distinguished.

ON the 14th December 1912, a box, No. 8570, containing certain cloths, marked 1058, was received by the firm of Ramkissen Jaiparmal, of 201, Harrison Road, and taken to their godown in Shama Bai's Lane, where

\* Criminal Revision No. 442 of 1913, against the order of R. D. Chatterjee, Fifth Presidency Magistrate, Calcutta, dated Feb. 26, 1913.

it was kept outside on the ledge. The package was missed on the 25th, and Hari Bux, a *munim* of the firm, reported the theft at the Jora Bagan thana on the 27th. From certain information received by him, he sent one Seo Sagar, a jemadar employed in the firm, to Takia, a railway station on the Oudh and Rohilkhand Railway. The latter arrived there on the 29th, found the box covered with gunny cloth bearing No. 671, on the station, and informed the station-master and the railway head-constable that it belonged to his master and had been stolen. It appeared that the box was despatched from Howrah on the 17th December, and reached Takia on the 29th. The name of the consignor entered on the railway receipt was *Raja Ram, Sada Ram*, and that of the consignee *Raja Ram, Shewdhar Sukul*. On the morning of the 29th, at about 7 or 7-30 A. M., some person went to the railway station with the railway receipt, but the station-master refused him delivery, as he stated that he was not the owner. The jemadar, Seo Sagar, then told the station-master that he would go and bring the consignee, and at about 10 A. M. he returned to the station with the petitioner, who presented the receipt to the station-master, paid the freight due on the consignment and received *formal* delivery (as was found by the Magistrate in his judgment and explanation). The petitioner was then informed of the theft of the box, and replied that he did know whether it was stolen property or not, and that, if it was so, the station-master might keep it and inform the police. The petitioner did not touch the box nor did he attempt to remove it from the station. The railway head-constable was then communicated with, and he came and took possession of the box (which was then opened in the presence of the petitioner) and its contents. He released the petitioner on his own

1913  
 SHEWDHAR  
 SOKUL  
 v.  
 EMPEROR.



1913  
—  
SHEWDHAR  
SUKUL  
v.  
EMPEROR.

recognizances, there being no sufficient evidence, in his opinion, of guilty knowledge on the part of the latter.

It appeared that there was a large fair then being held at Takia, that the petitioner had a stall there for the sale of piece-goods, and that during the period that the fair lasted a large number of packages were despatched to this station for various consignees.

The petitioner was arrested in Calcutta on the 20th January, 1913, and placed on trial before the Fifth Presidency Magistrate on a charge under s. 411 of the Penal Code. It was proved that the alleged consignors had no existence. The Magistrate convicted the petitioner, on the 26th February, and sentenced him to six months' rigorous imprisonment. He thereupon moved the High Court and obtained this Rule to set aside the conviction and sentence on the ground that the production of the railway receipt did not establish his possession. In his judgment and explanation the Magistrate referred to and relied on *Kashi Nath Bania v. Emperor* (1).

*Babu Kherode Lal Sen*, for the petitioner (after dealing with the facts). The case of *Kashi Nath Bania v. Emperor* (1) is distinguishable. There the accused denied the finding of the receipt in his possession, whereas in the present case he produced it himself. The authority of that decision has, besides, been weakened by the later ruling of *Ashruf Ali v. Emperor* (2). The facts do not constitute receipt of stolen property within s. 411 of the Penal Code. The accused never came into *actual* possession of it. After paying the freight, when he was informed of the property having been stolen, he told the station-master that if it was so the latter might keep it

himself. The petitioner did not remove the box nor did he call a coolie or make any other attempt to remove it from the railway station. The case falls within the rule in *Reg v. Hill* (1).

1913  
SHEWDHAR  
SUKUL  
v.  
EMPEROR.

*The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown. The facts found by the Magistrate are sufficient to support the conviction: *Kashi Nath Bania v. Emperor* (2).

IMAM AND CHAPMAN JJ. This was a Rule calling on the Chief Presidency Magistrate to show cause why the conviction should not be set aside on the ground that the production of the railway receipt does not establish the possession of the petitioner.

The petitioner was prosecuted for receiving stolen property, under section 411 of the Indian Penal Code, in the form of a package containing some piece-goods, at the railway station Takia, on the Oudh and Rohilkhand Railway. The goods belonged to a firm of dealers of the name of Ramkissen Das Jaiparmal, and were missed from their godown on the 25th December, 1912. Information of the disappearance of the package was given to the police on the 27th December, and it seems that, on the 28th December, Seo Sagar, a jemadar of that firm, having come to know that the goods had been despatched to Takia, started for that railway station. On arrival at Takia on the following morning, 29th December, he informed the station-master of the incident after he had found the package in question at the railway station amongst the goods that had to be delivered to various consignees. That morning, at 7 A. M. or thereabout, a man other than the petitioner came to take delivery of the goods, but on being questioned by the station-master he was not

(1) (1849) 3 Cox C. C. 533 :

(2) (1905) I. L. R. 32 Calc. 557.

1 Den. C. C. 453.

1913  
SHEWDHAR  
SUKUL  
v.  
EMPEROR.

able to satisfy that officer that he was entitled to receive the goods. That man was sent away, and it seems that Seo Sagar said that he could bring the petitioner, Shewdhar Sukul, to whom the goods had been consigned for taking delivery, and, as a matter of fact, at about 10 A. M. Shewdhar Sukul, accompanied by Seo Sagar, came to the station, presented the railway receipt before the station-master, paid the freight for the goods and received delivery of the goods from the station-master.

It is contended on behalf of the petitioner that no actual delivery took place, because, although the receipt had been returned to the railway office and the freight paid, the goods had not, as a matter of fact, been removed by the petitioner, and that, therefore, the transaction could not be construed either into receiving the goods or having possession over them.

Information of this receiving of stolen goods was given at once to the police, and the petitioner was arrested. The petitioner's defence in the lower Court was that, at the time when the goods came to Takia, a large and popular fair was held at that place and the petitioner had a shop of piece-goods and things of sorts at that fair. It was further contended that the goods, as a matter of fact, had been brought to Takia by Seo Sagar, and the railway receipt was handed to the petitioner, and the petitioner was brought by him to the railway station to receive the goods; that, in these circumstances, the petitioner was quite innocent and knew nothing as to the stolen character of the articles in question, and that he could not be convicted under section 411 of the Indian Penal Code.

The facts found by the learned Presidency Magistrate are that, as a matter of fact, the goods had disappeared from the godown of Ramkissen Das Jaiparmal some time before the 24th December; that

they had been despatched to Takia; that at that station the petitioner had received the goods; that he has not been able to account for the possession or the fact of his receiving the goods.

The Rule in this case is limited to the construction that is to be placed on the possession of the railway receipt, or the production of it by the petitioner.

There might have been something said in favour of the petitioner if the matter had ended with the mere production of the railway receipt; but we see in this case that, after the production of the railway receipt, the delivery of the goods had been effected. The station-master swears that delivery was made. He further says that freight had been paid by the petitioner. We are not in a position to accept the petitioner's contention that unless and until he had removed the goods from the railway premises he could not be declared to have received the goods. The case of *Reg v. Hill* (1) has been cited to us as an authority on which this conviction is sought to be set aside. The judgment in that case proceeded on the prisoner never having in fact received the stolen property, and never having had power over it. That cannot be said to be the case in the present instance. After the delivery of the goods by the station-master, they came to be not merely in the potential possession of the petitioner, but actually within his power and unrestricted control. It was open to him to do as he liked with the goods; he could have removed them without let or hindrance to any place wheresoever he might have wished them to be carried, the possession of the Railway Company having, from the moment of the delivery, ceased, and that of the petitioner having commenced. In these circumstances, we do not see how the Rule in the terms

1913  
SHEWDHAR  
SUKUL  
v.  
EMPEROR.

(1) (1849) 3 Cox C. C. 533 : 1 Den. C. C. 453.

1913  
—  
SHEWDHAR  
SUKUL  
v.  
EMPEROR.

in which it was issued can be made absolute. We are, therefore, not prepared to set aside this conviction.

We have been asked by the learned vakil on behalf of the petitioner to consider the question of sentence. The petitioner has been sentenced to a term of six months' rigorous imprisonment, and it is said that he does not deserve such a severe punishment, inasmuch as he offered to the station-master that, as the goods were represented to be stolen, they might be kept by the station-master and that information of the goods being stolen might be given to the police. Had this offer been made by the petitioner to the station-master before the delivery of the goods, the question of *locus penitentie* might easily have been raised. That, however, does not arise in the circumstances of this case. We are inclined to think that as soon as the petitioner discovered that people knew that the goods were stolen he possibly was penitent; but because of the penitence of the petitioner if we were to reduce his punishment, we would be encouraging the receipt of stolen property by others. Most of these cases of receipt of stolen property disclose that the thefts would not probably have taken place if the receivers had not encouraged the thefts. In this case, whatever might be said in respect of the penitence of the petitioner, one fact stands out very prominently against him, and that is, that even at the trial he did not disclose the name of the person who had consigned the goods to him. He attempted to show that Seo Sagar was the consignee, that he (Seo Sagar) had brought the goods to Takia and had attempted to get the petitioner into trouble, and here at the bar, it has been argued that Seo Sagar is the real thief.

Upon the facts that have been disclosed in this case, we see not a tittle of evidence to charge Seo

Sagar with the misdeed. We, therefore, considering the conduct of the petitioner in laying a false charge against Seo Sagar and his failure to disclose the name of the real consignor, see no reason to interfere with the sentence. The sentence that has been passed must be undergone by the petitioner. The Rule, therefore, is discharged.

1913  
SHEWDHAR  
SEKUL  
v.  
EMPEROR.

E. H. M.

*Rule discharged.*

---

[END THE VOLUME XL.]

---



# GENERAL INDEX

PAGE.  
**Abandonment:** See LANDLORD AND TENANT 870  
 See TRADE-MARK ... 814

**Abwab—Illegal cess—Rent—Bengal Tenancy Act (VIII of 1885), s. 74—Regulation VIII of 1793, ss. 54 and 55—Contract.** If, upon a fair interpretation of the terms of the contract, the sum claimed can be deemed part of the actual rent, the tenant is bound to pay it; if, on the other hand, the sum claimed can only be regarded as an imposition in addition to the actual rent, the stipulation for its payment is void. Under a lease of certain lands the yearly rent was specified as assessed at a certain rate, and at the end of the lease, in a clause entirely distinct from the one wherein the rent was assessed, a provision was made for the delivery of husk, which was not expressly or by implication made part of the rent. The plaintiffs brought a suit for arrears of rent on the basis of this lease, claiming a deduction of a certain sum of money for unculturable lands, and seeking to recover arrears of rent besides husk. They further claimed cesses upon the amount stated to be rent, and not upon the amount claimed as price of the husk: *Held* that the sum claimed as the value of the husk did not form part of the consolidated rent, but was an independent item falling within the description of an imposition in addition to the actual rent. *Sonnum Sookul v. Shaikh Elahee Baksh*, 7 W. R. 453, *Raj Nurain Mitra v. Panna Chand Singh*, 7 C. W. N. 203, *Gayratulla Sardar v. Girish Chandra Bhaumik*, 12 C. W. N 175,

PAGE.  
**Abwab—concll.**  
*Krishna Chandra Sen v. Sushila Soondury Dasee*, 1. L. R. 26 Calc. 611, *Sreekunta Prasad v. Irshad Ali Sircar*, 18 C. L. J. 225, approved *Radha Charan Ray Chowdhry v. Golak Chandra Ghose*, 1. L. R. 31 Calc. 834, distinguished. *Tilukhdari Singh v. Chulhan Mahton*, 1 L. R. 17 Calc. 131, *Radhu Prosad Singh v. Bal Kowar Koori*, 1. L. R. 17 Calc. 726, referred to. *MATHURA PRASAD v. TOTA SINGH*, (1912) 1. L. R. 40 Calc. 806  
**Account, suit for:** See COMMON MANAGER 150

*Principal and Agent—Proprietor appointed by the co-proprietors as common Manager for payment of joint debts, whether an agent of the latter and of the heirs of a deceased proprietor—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 89—Plea of Limitation under the Act taken on remand after previous unsuccessful plea of limitation under Act VIII of 1869, s. 30.* A proprietor appointed by the other co-proprietors of an estate as common manager thereof, for the purpose of realizing its profits and appropriating them to the payment of their joint debt, is an agent of the other proprietors and of the legal representatives of a proprietor since deceased, within Art. 89 of the Limitation Act (IX of 1908) and the period of limitation of a suit for accounts brought by the latter against such manager is governed thereby. Where repeated demands for accounts were alleged in the plaint to have been made, but the dates were not mentioned nor proved and the demands appeared to have



**Account, suit for:—concl'd.**

continued to the termination of the agency, it was *held* that limitation commenced to run from the date of the termination of the agency. A plea of limitation under the Limitation Act may be raised on the hearing after the remand of a case by the High Court notwithstanding the failure of a similar plea taken only under s. 30 of Act VIII of 1869 on the first hearing in the Court below. CHANDRA MADHAB BARUA *v.* NOBIN CHANDRA, BARUA (1912) I. L. R. 40 Calc. ... .. 108

**Accused, statement by:** *See* DEFAMATION 433

**Acquiescence:** *See* ADVERSE POSSESSION ... 173

———— *See* HINDU LAW—ALIENATION ... .. 966

**Acquisition of Dedicated Property:** *See* SHEBAIT ... .. 895

**Act 1850—XXI:** *See* REMOVAL OF CASTE DISABILITIES ACT.

**Act 1859—XI:** *See* SALE FOR ARREARS OF REVENUE.

**Act 1860—XIV:** *See* PENAL CODE.

**Act 1861—V:** *See* POLICE ACT.

**Act 1863—XX:** *See* RELIGIOUS ENDOWMENTS ACT.

**Act 1865—III:** *See* CARRIERS' ACT.

**Act 1865—X:** *See* SUCCESSION ACT.

**Act 1869—IV:** *See* DIVORCE ACT.

**Act 1870—VII:** *See* COURT FEES ACT.

**Act 1870—XXI:** *See* HINDU WILLS ACT.

**Act 1872—I:** *See* EVIDENCE ACT.

**Act 1872—IX:** *See* CONTRACT ACT.

**Act 1877—I:** *See* SPECIFIC RELIEF ACT.

**Act 1877—XV:** *See* LIMITATION ACT, 1877.

**Act 1881—V:** *See* PROBATE AND ADMINISTRATION ACT.

**Act 1882—IV:** *See* TRANSFER OF PROPERTY ACT.

**Act 1882—VI:** *See* COMPANIES ACT.

**Act 1882—XIV:** *See* CIVIL PROCEDURE CODE, 1882.

**Act 1885—VIII:** *See* BENGAL TENANCY ACT.

**Act 1885—XVII:** *See* CENTRAL PROVINCES GOVERNMENT WARDS ACT.

**Act 1887—VII:** *See* SUITS VALUATION ACT.

**Act 1887—XII:** *See* CIVIL COURTS ACT.

**Act 1887—XVII:** *See* PANJAB LAND REVENUE ACT.

**Act 1889—IV:** *See* MERCHANDISE MARKS ACT.

**Act 1894—I:** *See* LAND ACQUISITION ACT.

**Act 1897—X:** *See* GENERAL CLAUSES ACT.

**Act 1898—V:** *See* CRIMINAL PROCEDURE CODE.

**Act 1899—VIII:** *See* PETROLEUM ACT.

**Act 1899—IX:** *See* ARBITRATION ACT.

**Act 1907—III:** *See* PROVINCIAL INSOLVENCY ACT.

**Act 1908—V:** *See* CIVIL PROCEDURE CODE.

**Act 1908—IX:** *See* LIMITATION ACT.

**Act 1909—III:** *See* PRESIDENCY TOWNS INSOLVENCY ACT.

**Act 1912—V:** *See* PROVIDENT INSURANCE SOCIETIES ACT.

**Act 1912—VI:** *See* LIFE ASSURANCE COMPANIES ACT.

**Adjudication Order, effect of:** *See* INSOLVENCY ... .. 78

**Administrators, disagreement between:** *See* LETTERS OF ADMINISTRATION ... 50

**Adopted Son:** *See* HINDU LAW—ALIENATION ... .. 966

———— *See* PARTIES—RELIGIOUS ENDOWMENT ... .. 323

**Adoption—Agarwal Banias of Zira, Panjab**  
—Custom—Adopted person, an orphan and married—Adoption by declaration of adoption and subsequent treatment of adoptee as adopted son—Privy Council, practice of—Concurrent decisions on fact. In this case in which the plaintiff sued for a declaration of his adoption, the parties were Agarwal Banias of Zira in the Panjab and the plaintiff being an orphan and married, the validity of the adoption, if made, depended upon whether they

PAGE.

PAGE.

**Adoption—*concl'd.***

were governed by custom or by the Hindu Law. Their Lordships of the Judicial Committee considered that the Courts below had concurrently found that among the class to which the parties belonged the rules of Hindu Law as to adoption did not apply, and that by the custom applicable to that class an unequivocal declaration by the adopting father that a boy had been adopted and the subsequent treatment of that boy as the adopted son, was sufficient to constitute a valid adoption; and that, in fact, the defendant had so adopted the plaintiff and treated him as his adopted son. In accordance, therefore, with the usual practice as to such concurrent decisions:—*Held*, that the adoption had been established. Owing, however, to the limited nature of the evidence as to custom among the Agarwal Banias of Zira, the effect of the decision should be confined by the particular circumstances of the case. *CHIMAN LAL v. HARI CHAND* (1913) I. L. R. 40 Cal. 879

**Adverse Possession—*Ghatwali tenure—***

*Non-payment, or discontinuance of payment of rent—Estoppel—Acquiescence—Misrepresentation—Grantor and grantee—Homestead land—Sale by the Collector under the Public Demands Recovery Act (XI of 1859)—Sale certificate—Title of auction purchaser—Limitation Act, (IX of 1908), s. 2 (8), Sch. I, Art. 144—Transfer of Property Act (IV of 1882), s. 43—Evidence Act (I of 1872), s. 115.* At an execution sale under the Public Demands Recovery Act, the right, title and interest in a certain homestead land forming part of a *ghatwali* tenure was sold in 1878 by the Collector. In the sale-certificate granted to the auction purchaser the land was described as rent-free, and, as a matter of fact, no rent was ever paid to the *ghatwal* or any body by judgement-debtor, or after him, by the auction-purchaser. In 1888 the plaintiff, an infant of 4 years of age,

**Adverse Possession—*concl'd.***

succeeded as *ghatwal* on the relinquishment of the office by his father. Thereafter, by an agreement between the young *ghatwal*, the Maharajah of Burdwan, who was the superior zamindar, and the Government, the young *ghatwal* relinquished the office on condition that the property should be treated as resumed by the State to be settled permanently with the Maharajah, by whom it would be granted in *mokarari* to the retiring *ghatwal*. This arrangement was carried out and in 1895 the plaintiff obtained the *mokarari* settlement from the Maharajah. In 1902 the plaintiff attained majority, and in 1904 he brought a suit to eject the representatives of the auction-purchaser from the homestead land and to recover possession of the same. *Held*, that mere non-payment of rent or discontinuance of payment of rent did not by itself constitute adverse possession. *Madan Mohan Gossain v. Kumar Rameswar Mulia*, 7 C. L. J. 615, *Troyluckhu Tarinee Dossia v. Mohima Chundra Muttuck*, 7 W. R. 400, *Rungo Lall Mundul v. Abdool Gaffor*, I. L. R. 4 Cal. 314, *Poresh Narain Roy v. Kassi Chunder Talukdar*, I. L. R. 4 Cal. 661, *Musayabulla v. Noorzahan*, I. L. R. 9 Cal. 808, *Prem Sukh Das v. Bhupia* I. L. R. 2 All. 517, referred to. *Held*, also, that in a suit of this description article 144 of the Limitation Act must be applied, and the plaintiff as *ghatwal* did not claim through his father as his predecessor within the meaning of section 2 of the Limitation Act. *Ram Chunder Singh v. Madho Kumari*, I. L. R. 12 Cal. 484; I. L. R. 12 I. A. 188, referred to. *Held*, further, that the plaintiff, when he succeeded as *ghatwal*, was an infant, and as he commenced the present suit within three years from the attainment of majority, the plea of limitation could not be sustained. *Held*, further, that no title by estoppel accrued in favour of the purchase at

	PAGE.		PAGE.
<b>Adverse Possession—<i>concl'd.</i></b>		<b>Agreement against Public Policy—<i>concl'd.</i></b>	
the certificate sale. There was no estoppel in this case as against the decree-holder, and the appellants, as representatives of the purchaser at the certificate sale, could not avail themselves of any possible estoppel against the Secretary of State or against the plaintiff as grantee from him through the Maharajah of Burdwan. <i>Held</i> , further, that even if there had been any estoppel available against the Secretary of State, there could have been none against the plaintiff; none was created by reason of what happened in 1888, because the estate did not then vest in the Crown to be granted afresh to the plaintiff, nor was any created by reason of what happened in 1895, because the so-called after-acquired title of the Secretary of State was acquired by him on condition that a clear title would be granted to the Maharajah of Burdwan as zemindar and to the plaintiff as <i>mokararidar</i> under him. The doctrine of estoppel does not apply where an after-acquired title is taken by the grantor under a conveyance made to him as a conduit and for the purpose of vesting the title in a third person. <i>PRASANNA KUMAR MOOKERJEE v. SHIRKANTHA ROUT</i> (1912), I. L. R. 40 Calc. ... 173		cedure Code, is void (though a settlement out of Court had been suggested by the Magistrate); and a suit by the master to enforce such a bond is not maintainable. <i>Nubbee Buksh v. Hingon</i> , 8 W. R. 412, commented on. <i>MAJIBAR RAHMAN v. MUKTASHED HOSEIN</i> , (1912) I. L. R. 40 Calc. ... 113	
<b>Agarwal Banias of Zira:</b> See <i>ADOPTION</i> ... 879		<b>Agreement to compound non-compoundable offence:</b> See <i>AGREEMENT AGAINST PUBLIC POLICY</i> ... 113	
<b>Agent:</b> See <i>ACCOUNT, SUIT FOR</i> ... 108		<b>Agriculturist in the Panjab, custom of:</b> See <i>HINDU LAW—ALIENATION</i> ... 288	
<b>Aggregate of Sentences:</b> See <i>APPEAL</i> ... 631		<b>Alienation:</b> See <i>HINDU LAW</i> ... 721	
<b>Agreement against Public Policy—<i>Contract Act (IX of 1872), s. 23—Compromise forbidden by law—An agreement to compound a non-compoundable offence, void—Criminal breach of trust—Mortgage—Illegal consideration.</i></b> It is contrary to public policy to compound a non-compoundable criminal case, and any agreement to that end is wholly void in law: <i>Held</i> , therefore, that a mortgage bond executed by a <i>gomastha</i> in favour of his master for withdrawal of a prosecution for criminal breach of trust, which is not compoundable under the Criminal Pro-		————— See <i>HINDU WIDOW</i> ... 555	
		————— See <i>MORTGAGE</i> ... 342	
		————— <b>by Father:</b> See <i>HINDU LAW—ALIENATION</i> ... 966	
		————— <b>, power of:</b> See <i>SHEBAIT</i> ... 895	
		<b>Ancestral Land:</b> See <i>HINDU LAW—ALIENATION</i> ... 288	
		<b>Appeal:</b> See <i>SANCTION FOR PROSECUTION</i> ... 37	
		————— See <i>TRANSFER</i> ... 259	
		————— <b>, overvaluation of:</b> See <i>REFUND OF COURT-FEE</i> ... 365	
		————— <b>, right of:</b> See <i>SANCTION FOR PROSECUTION</i> ... 239	
		<b>Appeal—Concurrent sentences of imprisonment not individually appealable—Aggregate of sentences—Right of appeal—Criminal Procedure Code (Act V of 1898), ss. 35 (3) and 413.</b> An accused sentenced to concurrent terms of imprisonment, not one of which is individually appealable, has no right of appeal. Concurrent sentences cannot, for the purposes of appeal, be taken collectively. <i>Suknandan Singh v. King-Emperor</i> , 17 C. L. J. 392, approved. <i>Abdul Khalek v. King-Emperor</i> , 17 C. W. N. 72, not followed. The mere admission of an appeal does not preclude the Court from subsequently determining the question whether or not an appeal lies in the case. <i>AZIZ SHEIKH v. EMPEROR</i> (1913) I. L. R. 40 Calc. ... 631	

**Appeal—concl'd.**

PAGE.

—*Small Cause case tried as an ordinary suit—Jurisdiction.* Where a Judicial officer invested with Small Cause Court jurisdiction tries a suit, which he might have tried under the summary procedure, in the ordinary manner, the character of the suit is not thereby altered, and his decree is not appealable: *Shunkarbai v. Somabhai*, I. L. R. 25 Bom. 417, followed. *INDRA CHANDRA MUKHERJEE v. SRISH CHANDRA BANERJEE* (1913), I. L. R. 40 Calc. ... 537

—**to Privy Council**—*Application for leave to appeal—Whether appeal to Privy Council lies in cases under the Provincial Insolvency Act—Right of appeal to Privy Council, on what it rests—Letters Patent (of 1865), cl. 39—Civil Procedure Code (Act V of 1908), ss. 109, 110, and O. XLV, r. 3—Provincial Insolvency Act (III of 1907), ss. 46, 47.* The right of appeal from the High Court to the Privy Council rests on cl. 39 of the Letters Patent (of 1865) read with ss. 109 and 110 and O. XLV, r. 3, of the Civil Procedure Code. The Provincial Insolvency Act does not interfere with any right of appeal to the Privy Council that may otherwise exist. *Bombay Burmah Trading Corporation, Ltd. v. Dorabji Cursetji Shroff*, I. L. R. 27 Bom. 415, referred to. Where an application for insolvency was dismissed under s. 15 of the Provincial Insolvency Act and an appeal was also dismissed in the High Court under O. XLI, r. 11:—*Held*, that an appeal to the Privy Council was competent if the matter was appealable in other ways. *CHATRAPAT SINGH DUGAR v. KHARAG SINGH LACHMIRAM*, (1913) I. L. R. 40 Calc. ... 685

*Orders under ss. 311, 312 of the Civil Procedure Code, 1882, confirming or setting aside sales—Civil Procedure Code, 1882, ss. 588 (16), 594, 595, 596—Orders declared final by s. 588—Setting aside sale in execution of decree—Non-representation of minor—Irregularities in proclamation of sale—Civil Procedure Code,*

**Appeal to Privy Council—cont'd.**

PAGE.

1882, s. 287—*Under-estimation of value of property—Rights of minor as his natural guardian.* An appeal lies to His Majesty in Council from an order under sections 311 and 312 setting aside or confirming a sale, notwithstanding the provisions as to such orders being final contained in section 588 (16) of the Code. The definition of "decree" in section 2 of the Code is not applicable to Chapter XLV (relating to appeals to His Majesty in Council). For the purposes of that Chapter a definition of "decree" has been therein adopted, which is special, and differs from the meaning it bears elsewhere in the Code. The word decree in that Chapter must be read as being equivalent to "decree, judgment or order." So read final orders may be appealed against to His Majesty in Council under section 595, and that provision cannot be restricted by the provisions of section 588 (16) that such orders passed in appeal "shall be final." In this case, which was an appeal from an order of the High Court confirming a sale in execution of decree, and reversing an order of a Deputy Commissioner which set the sale aside, it appeared that the judgment-debtor had died pending the proceedings for attachment and sale, leaving a widow and a minor son, and that the whole of the proceedings subsequent to his death were without notice to any one representing the minor; that the sale proclamation had not been properly made, and did not contain the particulars required by section 287 of the Code of Civil Procedure, 1882, especially those as to the value of the property, which was grossly under-estimated; that the property was sold for a very inadequate price; and that there was abundant evidence that the appellant had suffered substantial injury therefrom:—*Held* (reversing the decision of the High Court), that there had been no proper representation of the minor, and that the above matters constituted

**Appeal to Privy Council—*concl'd.***

material irregularities in publishing and conducting the sale within the meaning of section 311 of the Code, which justified the setting aside of the sale. There were concurrent decisions of the Courts in India that the Court of Wards never took charge of the property of the minor, and their Lordships came to the same conclusion. *Held*, that, inasmuch as the interests of the minor with regard to the property were not in fact represented by the Court of Wards, it was open to this mother as his natural guardian to appear (as she had done) and represent him in the proceedings, and his appeal was not rendered incompetent thereby. **KRISHNA PERSAD SINGH v. MOTI CHAND**, (1913) I. L. R. 40 Calc. ... 635

**—Right of appeal**

**—Proceedings on award by Collector under Land Acquisition Act (I of 1894)**  
**—Decision of Court of Lower Burma on reference by Collector of Rangoon**  
**—Question as to value of land a matter for local judicial tribunals.**  
 No appeal lies to His Majesty in Council from a decision of the Chief Court of Lower Burma, on a reference to that Court by the Collector of Rangoon, in proceedings under the Land Acquisition Act (I of 1894), on an award made by him as to the value of land acquired. A right of appeal must be given by express enactment, and cannot be implied. *Sandbuck Charity Trustees v. North Staffordshire Railway Co.*, L. R. 3 Q. B. D. 1, per Lord Bramwell, followed. The question in this case, moreover, being only a question of fact as to the value of land acquired under the Act, was in the opinion of their Lordships, one for decision by local arbitrators or Courts, and not a matter for determination by a judicial tribunal in England. **RANGOON BOTATUNG COMPANY, LTD., v. THE COLLECTOR, RANGOON** (1912), I. L. R. 40 Calc. ... 21

**Appellate Court, duty of:** See PRACTICE ... 37

PAGE.

PAGE.

**Application:** See SUIT ... 428

**Apportionment:** See LAND ACQUISITION—  
 COMPENSATION ... 64

— **of Costs:** See PUNITIVE  
 POLICE ... 452

**Arbitration—Bengal Chamber of Commerce, arbitration by—Award, filing of—Arbitration Act (IX of 1899), ss. 11, 13, 14 and 15—Rules under the Indian Arbitration Act, 1899—Submission—Bought and Sold notes—Stamp duty—Form of order—Costs.** Where bought and sold notes relating to a contract for the sale of goods, contained an arbitration clause, and were stamped with one anna stamps: *Held*, that, on the materials before the Court, the practice of stamping such documents with one anna stamps was not invalid, and the proceedings in arbitration were effectual. Under the provisions of the Indian Arbitration Act, an award is to be filed not on the application of the parties, but at the instance of the arbitrator; and when the award has been filed, the result is not that there is a suit in which a decree has been passed, but that there is an award which is enforceable as a decree. *Tribhuvandas Kallikandas Gajjar v. Jivachand*, I. L. R. 35 Bom. 196, and *In re a Bankruptcy Notice*, [1907] 1 K. B. 478, referred to. Such of the rules of Court framed under the Indian Arbitration Act as are not in accordance with the Act are inoperative, and no effect can be given to them. **BALINATH v. AHMED MUSAJI SALEJI** (1912) I. L. R. 40 Calc. ... 219

**Arbitration Act (IX of 1899) ss. 11, 13 to 15:** See ARBITRATION ... 219

**Arrears of Revenue:** See COMMISSIONER,  
 POWER OF ... 552

**Arrest and Search:** See CONSPIRACY ... 898

**Ascetics** See HINDU LAW—INHERITANCE ... 545

**Assessment, method of:** See LAND ACQUISITION—COMPENSATION ... 64

**Assessors, examination of—***Re-trial—Criminal Procedure Code (Act V of 1898), ss. 309, 403, 423, 439—Assessors not to be questioned until their opinions delivered and recorded—Rioting—Right of private defence—Practice.* Section 309 of the Code of Criminal Procedure gives the Judge a discretion to sum up the evidence for the benefit of the assessors if he thinks necessary, but it gives him no power to question them until they have delivered their opinions orally and he has recorded such opinions. When a conviction is set aside and a re-trial ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed, and having regard to the provisions of section 423 of the Code of Criminal Procedure, the provisions of section 403 in that respect cannot apply. *Krishna Dhan Mandal v. Queen-Empress*, I. L. R. 22 Calc. 377, and *Queen-Empress v. Jabanulla*, I. L. R. 23 Calc. 975, referred to. *NAZI-MUDDIN v. EMPEROR* (1912). I. L. R. 40 Calc. ... 163

**Assignment:** See TRADE-MARK ... 814

**Attached Property, claims to:** See VOLUNTARY PAYMENT ... 598

**Attachment:** See INSOLVENCY ... 78

**Attachment—Criminal Procedure Code (Act V of 1898), ss. 146 and 148—Refusal to grant time—Duties of the Magistrate—Practice.** It is only when the magistrate decides that none of the parties was in possession or is unable to satisfy himself as to which of them is in possession that he can attach property under s. 146 of the Criminal Procedure Code. He cannot say that he is unable to satisfy himself if he has never made the slightest effort to do so. *Mansar Ali v. Matiullah*, 12 C. W. N. 896, followed. *Bejoy Madhub Choudhury v. Chandra Nath Chuckerlitty*, 14 C. W. N. 80, distinguished. *SHEOBALAK RAI v. BHAGWAT PANDEY* (1912) I. L. R. 40 Calc. ... 105

**Attachment—concl.**

**Attachment—Warrant—Penal Code (Act XLV of 1860), s. 147—Nazir's power of Delegation—"Bailiff"—Civil Procedure Code (Act V of 1908), O. XXI, r. 25.** Where a nazir directed a peon to attach property and fixed a time within which the attachment was to take place and the peon executed the warrant of attachment after the expiration of the time so fixed: *Held*, that, the peon, deriving his authority from the Court to make the seizure, could lawfully make the seizure even after the time fixed by the nazir for the execution had expired. The nazir and bailiff are not the same person. The officer to whom O. XXI, r. 25, of the Civil Procedure Code refers is not the nazir, but the peon. *Dharam Chand Lall v. Queen-Empress*, I. L. R. 22 Calc. 596, distinguished. *SUBED ALI v. EMPEROR* (1913) I. L. R. 40 Calc. ... 841

**Attorney and Client—Practice—Refusal of attorney to proceed until payment of costs already incurred—Discharge by Attorney—Acceptance of discharge by client—Order for change of attorney—Payment of costs.** A firm of attorneys refused to proceed further in the conduct of a suit, unless their clients paid them as promised a certain sum on account of costs incurred: *Held*, that by so doing the attorneys discharged themselves, and the clients were entitled to an order for change of attorney without first paying the costs already incurred to the attorneys on the record. *Held*, further, that the mere fact that after the attorneys' refusal the clients instructed them to brief counsel to apply for an adjournment of the suit, which instruction the attorneys declined to accept, did not amount to a refusal on the clients' part to recognize the discharge of the attorneys. *Basanta Kumar Mitter v. Kusum Kumar Mitter*, 4 C. W. N. 767, and *Atul Chandra Mukerjee v. Shoshee Bhusan Mukerjee*, 6 C. W. N. 215, followed. *MAHESHPUR COAL COMPANY, LD. v. JATINDRA NATH GUPTA* (1912) I. L. R. 40 Calc. ... 386

	PAGE.		PAGE.
<b>Auction-purchaser, suit by, to recover purchase money:</b> <i>See</i> LIMITATION ...	187	<b>Candidate:</b> <i>See</i> PLEADERSHIP EXAMINATION	588
<b>Auction-purchaser, title of:</b> <i>See</i> ADVERSE POSSESSION ...	173	<b>Carriers—Carriers' Act (III of 1865), ss. 6, 7, 8, 9—</b> <i>Liability of steamer company for goods damaged in transit—Onus of proof—Negligence or criminal act of company, its servant, or agent presumed.</i> Where a steamer company forwarded a consignment of four tins of oil on terms contained in what is known as an owner's risk note, after receiving the tins in good condition, and the consignee refused to take delivery as one tin was cut open and partly empty and another was quite empty, and brought a suit for the value of the oil: <i>Held</i> , that the steamer company, being a common carrier, was in a different position from railway companies who are only bailees, coming under ss. 151, 152 and 161 of the Contract Act. Its liability is, therefore, that of an insurer subject to certain exceptions under s. 6 of the Carriers' Act. <i>Held</i> , also, that the onus was, as a matter of course, on the steamer company as common carriers, even in a case covered by special contract, to disprove negligence as the loss of the goods is <i>prima facie</i> evidence of negligence or criminal act of the carrier, his servants or agents. <i>Choutmull Doogur. v. The Rivers Steam Navigation Co.</i> , I. L. R. 24 Cal. 786, followed. <i>Irravally Flotilla Co. v. Bugwandas</i> , I. L. R. 18 Cal. 620, <i>Lalchand Sew Karan v. E. I. Ry. Co.</i> , 17 C. W. N. 635n, referred to. <i>Sheobarat Ram v. B. and N.-W. Ry. Co.</i> , 16 C. W. N. 766, not followed. <i>INDIA GENERAL STEAM NAVIGATION COMPANY v. BHAGWAN CHANDRA PAUL</i> , (1913) I. L. R. 40 Cal. ...	716
<b>Award, filing of:</b> <i>See</i> ARBITRATION ...	219	<b>Carriers Act (III of 1865), ss. 6 to 9:</b> <i>See</i> CARRIERS ...	716
<b>Bailiff:</b> <i>See</i> ATTACHMENT ...	849	<b>Cause of Action, abatement of:</b> <i>See</i> PARTES—RELIGIOUS ENDOWMENT ...	323
<b>Bar Council, Resolutions of:</b> <i>See</i> LIMITATION ...	898	<b>Central Provinces Government Wards Act (XVII of 1885) s. 18—</b> <i>Application of Act—Hindu joint family estates—Application by managing members of</i>	
<b>Benefits of Decree, suit for:</b> <i>See</i> PRINCIPAL AND AGENT ...	335		
<b>Bengal Chamber of Commerce, Arbitration by:</b> <i>See</i> ARBITRATION ...	219		
— <b>Tenancy Act (VIII of 1885), ss. 3 (16), 58 (3):</b> <i>See</i> COLLECTOR ...	465		
— <b>s. 25:</b> ...	870		
— <i>See</i> LANDLORD AND TENANT ...	870		
— <b>s. 30:</b> ...	29		
— <i>See</i> ENHANCEMENT OF RENT ...	29		
— <b>ss. 30</b> ...	428		
— <b>(b), 37, 105, 107, 109:</b> <i>See</i> SUIT ...	428		
— <b>s. 74:</b> ...	806		
— <i>See</i> ABWAB ...	806		
— <b>ss. 95,</b> ...	150		
— <b>98:</b> <i>See</i> COMMON MANAGER ...	150		
— <b>s. 101</b> ...	123		
— <b>Cls. 2(a), 3:</b> <i>See</i> ULTRA VIRES ...	123		
— <b>s. 148,</b> ...	462		
— <b>cl. (h):</b> <i>See</i> "LANDLORDS' INTEREST," MEANING OF ...	462		
<b>Bequest, conditions of:</b> <i>See</i> WILL ...	192		
<b>Bought and Sold Notes:</b> <i>See</i> ARBITRATION ...	219		
<b>Building Plans, sanction of:</b> <i>See</i> MUNICIPAL CORPORATION ...	836		
<b>Burden of Proof:</b> <i>See</i> HINDU LAW—ALIENATION ...	288		
<b>Burma Town and Village Lands Act (IV of 1898), s. 41 (b):</b> <i>See</i> JURISDICTION OF CIVIL COURT ...	391		
<b>Calcutta Municipal Act (Beng. III of 1899), ss. 375, 377:</b> <i>See</i> MUNICIPAL CORPORATION ...	836		
— <b>Police Act (Beng. IV of 1866) ss. 62A(4), 102A:</b> <i>See</i> PROCESSION ...	470		
— <b>Suburban Police Act (Beng. II of 1866) ss. 39A(4) 49A:</b> <i>See</i> PROCESSION ...	470		

**Central Provinces Government Wards Act (XVII of 1885), s. 18—contd.**

*joint family for superintendence of estate by Court of Wards—Mitakshara law, family governed by—Sanction by Chief Commissioner to mortgage of estate under charge of Court of Wards—Suit on mortgage after relinquishment of management by Court of Wards.* The Central Provinces Government Wards Act (XVII of 1885) applies to the superintendence by the Court of Wards of the estates of Hindu joint families, as well as to the separate estates of Hindus and others situate within the territories administered by the Chief Commissioner of the Central Provinces. The two managing members of a Hindu joint family governed by the Mitakshara law, and zamindars of the family estate of Baherakledi in Hosangabad, which had become overburdened with debt, applied under the above Act to the Deputy Commissioner, as the Court of Wards for the district, to assume superintendence of the joint family estate with a view to liquidate the debts: *Held*, that in making the application they acted within their power and authority as managing members, and in the interest of all the members of the joint family; and that inasmuch as no member had in the property any definite undivided share [*Gariibulloh v. Khalak Singh*, I. L. R., 25 All. 407; L. R. 30 I. A. 165, and *Appovier v. Rama Subba Aiyar*, 11 Moo. I. A. 75], what was taken over by the Court of Wards on assuming superintendence of the estate was the property of all the members of the joint family. The Chief Commissioner had power to sanction the assumption by the Court of Wards of the whole of the joint family property, whether the application was made by the managing members only, or by all the members of the family; and the acts of the Court of Wards in dealing with the property after charge of it was assumed, bound the interest of all the members. The sanction of the Chief Commissioner to a mortgage of such

**Central Provinces Government Wards Act (XVII of 1885), s. 18—continued.**

property, as required by section 18 of Act XVII of 1885, may be an implied sanction; it is not necessary that the mortgage to be made by the Court of Wards should be submitted to the Chief Commissioner for his sanction, nor that the sanction should be to the precise terms of the mortgage deed. By the terms of a mortgage made in 1891 by the Court of Wards in favour of the respondent (plaintiffs) on the security of the joint family estate, the mortgage money (Rs. 1,20,000) was repayable with interest by annual instalments of Rs. 10,000 extending over more than 20 years, and in the event of Rs. 30,000 becoming overdue the Court of Wards covenanted to recover such sum by sale or otherwise of sufficient of the mortgaged property. If it was found impossible to continue to manage the estate, the Court of Wards was either to sell up the entire property and devote the proceeds to the liquidation of the debt, or make over the estate to the mortgagees in satisfaction of their claim. In the event of the management being relinquished before the debt was liquidated in the ordinary course, the Court of Wards was to liquidate the debt remaining due by the sale of such portion of the property as might be necessary. The sum borrowed was applied to pay off the debts on the property. Only Rs. 16,000 was repaid up to 1893, and since then no instalment had been paid, the Court of Wards, owing to unforeseen circumstances, finding it impossible to pay more, either of principal or interest: and in March, 1902, the Court of Wards, after giving the mortgagees notice that the relinquishment by it of the management had been sanctioned, offered to make over to them the mortgaged property in satisfaction of their claim, "excepting the cultivating rights of *sir* land which are to be reserved for the maintenance of the wards," which the mortgagees declined as not being a compliance with the terms of the mortgage



	PAGE.		PAGE.
<b>Central Provinces Government Wards Act</b> (XVII of 1885), s. 18— <i>concl'd.</i>		<b>Charge—concl'd.</b>	
deed. In June, 1902, the Court of Wards relinquished the management of the estate without selling it or transferring it to the mortgagees. In a suit brought in 1904 on the mortgage for sale and recovery of the amount due: <i>Held</i> (affirming the decisions of the Courts in India), that, on the terms of the mortgage and under the circumstances of the case, the whole sum payable on the mortgage had become due on the relinquishment of the management by the Court of Wards, and the usual decree for sale was made. <i>GULAB SINGH v. GOKUL DAS</i> (1913) I. L. 40 Calc. ...	784	1898), ss. 233, 234 and 235— <i>Penal Code (Act XLV of 1860)</i> , ss. 408 and 477A. A charge of criminal breach of trust of a sum of money can be tried under s. 235 (1) of the Criminal Procedure Code, at the same time, with one of falsification of accounts made to conceal the act of misappropriation as part of the same transaction; and two unconnected charges of falsification may be tried at one trial under s. 234; but a charge of criminal breach of trust cannot be legally tried together with one of falsification relating to a distinct act of misappropriation committed in a separate transaction. <i>Kasi Viswanathan v. Emperor</i> , I. L. R. 30 Mad. 328; and <i>Subrahmaniam Ayyar v. King-Emperor</i> , I. L. R. 25 Mad 61; L. R. 28 I. A. 257, followed. <i>EMPEROR v. JIBAN KRISTO BAGCHI</i> (1912), I. L. R. 40 Calc. ...	318
<b>Certificate of Incorporation:</b> See COMPANIES ACT (VI OF 1882), ss. 6, 40, 41 ...	1	— <i>Omission to frame charge—</i>	
<b>Chairman:</b> See MUNICIPAL CORPORATION ...	886	<i>Rioting—Causing hurt—Conviction for an offence other than the one charged with—Error of law—“Error, omission or irregularity”—Criminal Procedure Code (V of 1898) ss. 535, 537 (a)—Practice.</i> Sections 535 and 537 (a) of the Criminal Procedure do not apply to a case where the accused is charged with one offence and convicted of another—totally different to the one he was charged, with. Section 233 is mandatory; for every distinct offence of which any person is accused there shall be a separate charge, and every charge shall be tried separately, except in the case mentioned in ss. 234, 235, 236 and 239 of the Code. Section 236 refers to a series of acts which are of such a nature that it is doubtful which of the several offences the facts constitute. To convict an accused of murder on a charge of rioting or to commit him to the Sessions without framing a charge would be not merely an irregularity but an error of law vitiating the trial. <i>SITA AHIR v. EMPEROR</i> (1912), I. L. R. 40 Calc. ...	168
<b>Change of Attorney:</b> See ATTORNEY AND CLIENT ...	386		
<b>Charge:</b> See INTEREST ...	514		
— <i>One head of charge relating to several distinct offences—Misjoinder—Illegality of trial—Criminal Procedure Code (Act V of 1898), s. 233.</i> A single charge relating to several distinct offences is illegal. Under s. 233 of the Criminal Procedure Code there should be a separate head of charge for each such offence. A charge under s. 409 of the Penal Code, of criminal breach of trust in respect of a total sum of 10 annas 6 pies, to wit, a sum of 4 annas 6 pies collected from A between certain dates in one year and a sum of 6 annas collected from B between other dates in the same year, is bad for misjoinder; and a trial held on such a charge is illegal. <i>Subrahmaniam Ayyar v. King-Emperor</i> , I. L. R. 25 Mad. 61, followed. <i>ASGAR ALI BISWAS v. EMPEROR</i> (1913) I. L. R. 40 Calc. ...	846		
— <i>Misjoinder of charges—Joint trial on charges of criminal breach of trust and falsification of accounts committed in separate transactions—Criminal Procedure Code (Act V of</i>			

	PAGE.
<b>Charge to Jury:</b> <i>See</i> JURY, TRIAL BY	... 367
<b>Charitable Bequest:</b> <i>See</i> WILL	... 192
<b>Chota Nagpur Landlord and Tenant Procedure Act (Beng. I of 1879) s. 123:</b> <i>See</i> EXECUTION OF DECREE	... 623
<b>Chota Nagpur Tenancy Act (Beng. VI of 1908) ss. 4(3), 41:</b> <i>See</i> EJECTMENT	... 858
<b>s. 27:</b> <i>See</i> HIGH COURT, JURISDICTION OF	... 518
<b>s. 47:</b> <i>See</i> MORTGAGE	... 534
<b>s. 139 (3) cl. (a):</b> <i>See</i> JURISDICTION OF CIVIL COURT	... 402
<b>s. 208:</b> EXECUTION OF DECREE	... 623
<b>Civil Courts Act (XII of 1887, ss. 21 (2), (4), and 22 (1):</b> <i>See</i> SANCTION FOR PROSECUTION	... 37
<b>— Procedure Code (Act XIV of 1882, s. 13; See COMPANIES ACT, 1882, ss. 6, 40, 41</b>	... 1
<b>— 1882, s. 13:</b> <i>See</i> ENHANCEMENT OF RENT	... 29
<b>— (Act XIV of 1882)</b>	
<b>s. 278:</b> <i>See</i> VOLUNTARY PAYMENT	... 598
<b>— 1882, ss. 287, 311, 312, 588, 594 to 596:</b> <i>See</i> APPEAL TO PRIVY COUNCIL	... 635
<b>— (Act V of 1908), ss. 1 (2), 48, 154:</b> <i>See</i> EXECUTION OF DECREE	... 704
<b>s. 47, O. XXI, rr. 22, 90:</b> <i>See</i> EXECUTION OF DECREE	... 45
<b>s. 73, O. XXI, r. 89:</b> <i>See</i> RATEABLE DISTRIBUTION	... 619
<b>s. 80:</b> <i>See</i> NOTICE	... 503
<b>ss. 109, 110, O. XLV, r. 3:</b> <i>See</i> APPEAL TO PRIVY COUNCIL	... 685
<b>ss. 112, 151; O. XLI, r. 5 (2):</b> <i>See</i> HIGH COURT, JURISDICTION OF	... 955

	PAGE.
<b>Civil Procedure Code (Act V of 1908)—<i>could.</i></b>	
<b>s. 115:</b> <i>See</i> HIGH COURT, JURISDICTION OF	... 477
<b>O. VII, r. 11:</b> <i>See</i> COURT-FEE	... 615
<b>O. XXI, r. 25:</b> <i>See</i> ATTACHMENT	... 849
<b>O. XXXIV, r. 6:</b> <i>See</i> MORTGAGE	... 342
<b>O. XL, r. 1:</b> <i>See</i> RECEIVER	... 862
<b>O. XLI, r. 20; O. XXII, r. 10; O. I, r. 10</b>	
<i>See</i> PARTIES	... 323
<b>Codicil:</b> <i>See</i> WILL	... 192
<b>Coercion:</b> <i>See</i> VOLUNTARY PAYMENT	... 598
<b>Cognizance—Police report—Case made over to another Magistrate for enquiry and report—Criminal Procedure Code (Act V of 1898), ss. 173, 190 (1) (b)—Practice.</b> Where a Magistrate, upon receiving a police report under s. 173, does not take cognizance of the case under s. 190 (1) (b), which he is perfectly competent to do, but makes it over for enquiry and report to an Honorary Magistrate, he acts contrary to the provisions of the Law. <i>ABDULLAH MANDAL v. EMPEROR</i> (1913) 1 L. R. 40 Cal	... 854
<b>Collector—Jurisdiction—Complaint to Collector of the district under s. 58 (3) of the Bengal Tenancy Act (VIII of 1885)—Transfer of inquiry to Sub-divisional Officer for disposal—Deputy Collector—Jurisdiction of Sub-divisional Officer to hold such inquiry and to direct a prosecution for fabrication of false evidence—Bengal Tenancy Act, s. 3(16), 58(3)—Government Notification of 19th September 1910—Reg. IX of 1833, ss. 20 and 21—Criminal Procedure Code (Act V of 1898), s. 476.</b> Under s. 3 (16) of the Bengal Tenancy Act and Government Notification of the 19th September 1910, a Subdivisional Officer is a "Collector" and is authorized to hold an inquiry under s. 58 (3) of the Bengal Tenancy Act. A Collector of	

	PAGE.	PAGE.
<b>Collector—concl'd.</b>		
the district has power, on complaint made to him, to transfer such inquiry for disposal to a Subdivisional Officer who is, under ss. 20 and 21 of Reg. IX of 1833, subordinate to the Collector, and is required to perform all the duties as signed to him by that functionary. Where, therefore, a complaint under s. 58 (3) of the Bengal Tenancy Act was made to the Collector of the district and transferred by him for disposal to the Subdivisional Officer who found that certain rent-receipt-books, filed in the course of the inquiry, had been fabricated: <i>Held</i> , that the latter had jurisdiction, under s. 476 of the Criminal Procedure Code, to direct a prosecution of the offenders for offences under ss. 193 and 196 of the Penal Code. <i>PHANINDAR SINGH v. EMPEROR</i> (1913) I. L. R. 40 Calc. ...	465	
<b>Collector, sale by:</b> See ADVERSE POSSESSION	173	
<b>Collector of Rangoon, Reference by:</b> See APPEAL TO PRIVY COUNCIL	21	
<b>Colonial Probates Act (55 &amp; 56 Vict., c. 6.):</b> See LETTERS OF ADMINISTRATION	74	
<b>Commissioner, power of—Revenue Commissioner, power to review order made by, annulling sale for arrears of revenue—Act XI of 1859, s. 25, as amended by Bengal Act VII of 1868, s. 2. Held</b> (affirming the decisions of the Courts in India), that a Revenue Commissioner acting under Act XI of 1859, as amended by Bengal Act VII of 1868, had, under the circumstances, no power to review his order setting aside a sale held for arrears of revenue. <i>BAIJNATH RAM GOENKA v. NAND KUMAR SINGH</i> (1913) I. L. R. 40 Calc. ...	552	
<b>Commissioner of Partition, sale by:</b> See REVIEW	140	
<b>Commissioner of Police, power of:</b> See PROCESSION	470	
<b>Commitment to Sessions:</b> See JURISDICTION OF CRIMINAL COURT	360	
<b>Committee:</b> See PARTIES—RELIGIOUS ENDOWMENT	323	
<b>Common Manager:</b> See ACCOUNT, SUIT FOR 108 Bengal Tenancy Act (VIII of 1885), ss. 95-98— <i>Suit against a Common Manager for general accounts, after accounts passed by the District Judge, whether maintainable—Position of a Common Manager.</i> A Common Manager appointed under section 95 of the Bengal Tenancy Act by the District Judge, is an officer of the Court created by the statute, and in so far he holds his office and performs his duties under the provisions of the Act, is in a position analogous to that of a Receiver appointed by the Court, and is entitled to the same protection, for the period during which he exercises his duties within the powers given to him by the Act, as a Receiver appointed by the Civil Court. No suit by a co-owner to render a general account for the whole period of his management could lie against a Common Manager who has, in accordance with the provisions of the law which defines his duties, regularly submitted accounts for the period of his management to the District Judge and which accounts have been duly audited and passed by the District Judge. A suit is also not maintainable by a Co owner against a Common Manager for recovery of specific sums of money, which in the ordinary course of the management ought to have appeared in the account and which the co-owner was aware at the time, were not included in the account, or with due enquiry might have discovered were not included in the account, except with the previous sanction of the District Judge. <i>Khitish Chandra Acharjya Chowdhury v. Osmond Beeby</i> , I. L. R. 39, Cal. 587; 16 C. W. N. 516 and <i>Mahomed Faiz Chowhury v. Upendra Lal Singh Roy</i> , 2 Ird. Cas. 597, distinguished. <i>NABA KISHORE MANDAL v. ATUL CHANDRA CHATTERJI</i> , (1912) I. L. R. 40 Calc. ...	150	
<b>Companies Act (VI of 1882), ss. 6, 40 and 41</b> <i>Certificate of Incorporation of Company, effect of—Objection to formation</i>		

PAGE.

**Companies Act (VI of 1882)—*contd.***

of Company, the Memorandum of Association not being signed by seven persons as required—*Matter in issue not made ground of attack in former suit—Res judicata—Civil Procedure Code, 1882, s. 13.* The provisions of the Indian Companies Act (VI of 1882) as regards the incorporation of Companies are the same as those contained in the Imperial Act of 1862 except that it is specially provided in section 40 of the Indian Act that it is not the duty of the Registrar to require evidence as to whether the subscribers to the Memorandum of Association are competent to contract. Section 6 of the Act provides that "any seven or more persons . . . may, by subscribing their names to a Memorandum of Association and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated Company, etc." And s. 41 enacts that "a certificate of the incorporation of any Company given by the Registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with." The Memorandum of Association of a proposed Company was signed before the Registrar by two adult persons and also by a person who under the Guardians and Wards Act (VIII of 1890) had been duly appointed by the Court guardian of five minors, the guardian making a separate signature for each minor; and the Registrar issued a certificate of the due incorporation of the Company. In a suit in which it was objected, *inter alia*, that that the Company was not properly constituted the Memorandum of Association not having been signed by the required number of seven subscribers:—*Held* (reversing the decision of the Chief Court of Lower Burma on its Appellate Side), that assuming the conditions of registration were not duly complied with, certificate of incorporation was conclusive for all pur-

PAGE.

**Companies Act (VI of 1882)—*concl.***

poses, and the Court could not go behind it and consider any alleged defects in the formation or constitution of the Company. *In re Barned's Banking Company. Peel's Case, L. R. 2 Ch. App. 674, per Lord Cairns L. J.; and Oakes v. Turquand L. R. 2 E. & Ir. App. 325, per Lord Chelmsford L. C., followed.* But apart from the English decisions, the use of the word "otherwise" in s. 6 of Act VI of 1882 showed that the statutory condition that the Memorandum of Association must be signed by seven or more persons was as much a condition, of registration as any other to be found in the Act which was preliminary to registration and apparently essential: *Held*, also, that the issue as to the invalidity of the Company might and ought to have been made a ground of attack in a former suit brought by the same plaintiff against the same defendants in 1902 which had been dismissed. All the facts on which the present suit was based were known to the plaintiff, and were stated at length in the proceedings in the former suit. No further evidence would have been needed. Nothing was wanting but the addition of an issue on the point. The present suit as regards that question was therefore barred as *res judicata* under s. 13, Explanation 2 of the Civil Procedure Code, 1882. *Kameswar Pershad v. Rajkumari Ruttan Koer, I. L. R. 20 Calc. 79; L. R. 19 I. A. 234, followed. MOOSA GOOLAM ARIFF v. EBRAHIM GOOLAM ARIFF (1912). I. L. R. 40 Calc. ... 1*

<b>Company, formation of:</b>	<i>See</i> COMPANIES ACT, 1882, ss. 6, 40, 41	... 1
<b>Compensation:</b>	<i>See</i> LAND ACQUISITION	... 64
<b>Compensation for Improvements:</b>	<i>See</i> HINDU WIDOW	... 555
<b>Compensation Money, withdrawal of:</b>	<i>See</i> SHEBAIT	... 895
<b>Complaint:</b>	<i>See</i> COLLECTOR	... 465

	PAGE.
<b>Complaint:</b> See JURISDICTION OF CRIMINAL COURT ... ..	360
— <b>dismissal of:</b> See CRIMINAL REVISION ... ..	41

— **dismissal of**—*Jurisdiction to direct a prosecution in the absence of any judicial proceeding—Order not made independently, but on the suggestion of the District Magistrate—Complaint—Preliminary enquiry without the existence of reasons for doubting its truth—Omission to record reasons—Permission given to accused to cross-examine and adduce defence evidence—Penal Code (Act XLV of 1860), s. 211—Criminal Procedure Code (Act V of 1898), ss. 202 and 476—Practice.* Where the petitioner's case was disposed of by the acquittal of the accused, on the 1st August by a Magistrate who did not then take action under s. 476 of the Criminal Procedure Code, but proceedings thereunder were taken on the 9th August, and an order made on the 23rd by another Magistrate, who had then no seisin of the case, and the District Magistrate having expressed a doubt as to the jurisdiction of the latter and having considered that such order should be passed by the Magistrate who tried the original case, such Magistrate thereupon, purporting to act under s. 476, directed the prosecution of the petitioner, under s. 211 of the Penal Code, on the 16th September: *Held*, (i) that the order of the 23rd August was without jurisdiction, as there was no judicial proceeding of any kind before the Magistrate who passed it; (ii) that the order of the 16th September was bad in law, as the trying Magistrate had not considered it necessary to take action under s. 476, when he acquitted the accused in the original case, and did not exercise an independent judicial opinion in passing it a month-and-a-half later at the instance of the District Magistrate. There may be cases in which a Court does not think it necessary in the

### Complaint, dismissal of—*concl'd.*

public interest to take action under s. 476 of the Code, and allows the injured person to seek redress by granting sanction, and in such a case it is not necessary that the order should be passed at or near the time of the disposal of the original case. When a complainant perfers a complaint and supports it by his oath, he is entitled to be believed, unless there is some apparent reason for disbelieving him, and he is entitled to have the persons complained against brought to trial. When there is no reason whatever for disbelieving the truth of the complaint, the Magistrate has no jurisdiction to act under s. 220. The accused should not be made a party to a proceeding under s. 202, nor allowed to cross-examine the prosecution witness or to adduce evidence for the defence: *Baidya Nath Singh v. Muspratt*, I. L. R. 14, Calc. 141 approved: *Emperor v. Tanuk Lal Chowdhuri* (unreported) disapproved. BHIM LAL SAIN V. EMPEROR (1912), I. L. R. 40 Calc. 444

### Compromise Decree: See REVIEW, APPLICATION FOR ... ..

— **forbidden by Law:** See

AGREEMENT AGAINST PUBLIC POLICY 113

**Compulsion, money paid under:** See VOLUNTARY PAYMENT ... ..

**Concurrent Sentences:** See APPEAL ... 631

**Confession**—*Record of confession—Questioning the accused regarding its voluntariness at the end of the statement—Criminal Procedure Code (Act V of 1898), s. 164—Confession partly false, evidentiary value of.* Where an enquiry as to the voluntary character of the confession is made by the Magistrate not at the commencement, but at the end of the statement by the accused, the defect is merely one of form. If a confession is found to be false in part, viz., as to the justifying motives for an offence, it does not follow that the rest of it, relating to the commission of the offence, must be rejected. Where the entire statement of a

## PAGE.

**Confession—concl'd.**

prisoner has been given in evidence any part of it may be contradicted by the prosecution, and if sufficient grounds exist, the Court may accept the incriminatory, and reject the exculpatory, portions. *Rex v. Higgins*, 3 C. & P. 603; *Rex v. Clewes*, 4 C. & P. 221; *Rex v. Steptoe*, 4 C. & P. 397, referred to. *PULIN TANTI v. EMPEROR* (1913) I. L. R. 40 Calc. ... .. 873

**Consequential Relief:** *See* COURT-FEE ... 245, 615.

**Conspiracy to prosecute maliciously, suit for:** *See* LIMITATION ... .. 898

**Construction of Statutes:** *See* DEFAMATION 433

**Contingent Bequest:** *See* HINDU LAW—WILL ... .. 274

**Contract:** *See* ABWAB ... .. 806

— **Act (IX of 1872) ss. 15, 69, 70, 72, illus. (b):** *See* VOLUNTARY PAYMENT ... .. 598

— **s. 23:** *See* AGREEMENT AGAINST PUBLIC POLICY 113

— **s. 247:** *See* SALE OF GOODS ... .. 523

**Conversion:** *See* HINDU LAW—JOINT FAMILY ... .. 407

**Coparcenership:** *See* HINDU LAW—JOINT FAMILY ... .. 407

**Co-sharers:** *See* DISPUTE CONCERNING LAND ... .. 982

**Costs:** *See* ARBITRATION ... .. 219

— *See* TRADE-MARK ... .. 814

— **apportionment of:** *See* PUNITIVE POLICE ... .. 452

— **payment of:** *See* ATTORNEY AND CLIENT ... .. 386

**Counsel, professional conduct of:** *See* LIMITATION ... .. 898

— **engaged in case, appearing as witness:** *See* LIMITATION ... .. 898

**Counterfeiting Trade-mark:** *See* TRADE-MARK ... .. 281

## PAGE.

**Court-fee—Declaratory decree, suit for—**

*Consequential relief—Plaint, rejection of—Civil Procedure Code (Act V of 1908), O. VII, r. 11—Valuation of suit*

*—Court-fees Act (VII of 1870), s. 7, paras. iv, cl. (c), v, cl. (a)—Valuation for purpose of jurisdiction—Suits Valuation Act (VII of 1887), s. 8.* In a suit for declaration that a decree amounting to Rs. 2,794 and odd should be declared forged, illusory and unfit for execution, and also for a declaration that the family property valued at Rs. 7,000 was not liable to be sold in execution of that decree, the plaintiff paid court-fee ten times the Government revenue payable on the land worth Rs. 7,000. The Court below rejected the

plaint:—*Held*, that the real value of the reliefs claimed was Rs. 2,794 and odd, the value of the decree, and that, the plaintiff not having paid court-fee on that amount, the

plaint was rightly rejected. A plaintiff cannot value his case for the purpose of court-fee and for the purpose of jurisdiction at different amounts. *HARIHAR PRASAD SINGH v. SHYAM LAL SINGH*, (1913) I. L. R. 40 Calc. ... .. 615

— *Held*, that the real value of the reliefs claimed was Rs. 2,794 and odd, the value of the decree, and that, the plaintiff not having paid court-fee on that amount, the

plaint was rightly rejected. A plaintiff cannot value his case for the purpose of court-fee and for the purpose of jurisdiction at different amounts. *HARIHAR PRASAD SINGH v. SHYAM LAL SINGH*, (1913) I. L. R. 40 Calc. ... .. 615

— *Held*, that the real value of the reliefs claimed was Rs. 2,794 and odd, the value of the decree, and that, the plaintiff not having paid court-fee on that amount, the

plaint was rightly rejected. A plaintiff cannot value his case for the purpose of court-fee and for the purpose of jurisdiction at different amounts. *HARIHAR PRASAD SINGH v. SHYAM LAL SINGH*, (1913) I. L. R. 40 Calc. ... .. 615

**Declaratory suit—Consequential relief—Injunction, prayer for—Endowment—Valuation of suit—Jurisdiction—Specific Relief Act (I of 1877) s. 42—Court-fees Act (VII of 1870), s. 7 (iv) (c)—Suits Valuation Act (VII of 1877) s. 8.** The plaintiff brought a suit for declaration that he was the sole *shebait* of the family deity, and was entitled as such to exclusive possession of the disputed properties on behalf of the deity, and also for a declaration that the registration of the name of the principal defendant as joint owner of the endowed properties with the plaintiff in the books of the Collector, was improperly made. He valued the suit, for purposes of jurisdiction, at Rs. 11,005, and paid Rs. 10 as court-fee under Schedule II, Art. 17 (iii) of the Court-fees Act.

The plaintiff brought a suit for declaration that he was the sole *shebait* of the family deity, and was entitled as such to exclusive possession of the disputed properties on behalf of the deity, and also for a declaration that the registration of the name of the principal defendant as joint owner of the endowed properties with the plaintiff in the books of the Collector, was improperly made. He valued the suit, for purposes of jurisdiction, at Rs. 11,005, and paid Rs. 10 as court-fee under Schedule II, Art. 17 (iii) of the Court-fees Act.

The plaintiff brought a suit for declaration that he was the sole *shebait* of the family deity, and was entitled as such to exclusive possession of the disputed properties on behalf of the deity, and also for a declaration that the registration of the name of the principal defendant as joint owner of the endowed properties with the plaintiff in the books of the Collector, was improperly made. He valued the suit, for purposes of jurisdiction, at Rs. 11,005, and paid Rs. 10 as court-fee under Schedule II, Art. 17 (iii) of the Court-fees Act.

The plaintiff brought a suit for declaration that he was the sole *shebait* of the family deity, and was entitled as such to exclusive possession of the disputed properties on behalf of the deity, and also for a declaration that the registration of the name of the principal defendant as joint owner of the endowed properties with the plaintiff in the books of the Collector, was improperly made. He valued the suit, for purposes of jurisdiction, at Rs. 11,005, and paid Rs. 10 as court-fee under Schedule II, Art. 17 (iii) of the Court-fees Act.

The plaintiff brought a suit for declaration that he was the sole *shebait* of the family deity, and was entitled as such to exclusive possession of the disputed properties on behalf of the deity, and also for a declaration that the registration of the name of the principal defendant as joint owner of the endowed properties with the plaintiff in the books of the Collector, was improperly made. He valued the suit, for purposes of jurisdiction, at Rs. 11,005, and paid Rs. 10 as court-fee under Schedule II, Art. 17 (iii) of the Court-fees Act.

	PAGE.		PAGE
<b>Court-fee—<i>could</i>.</b>		<b>Criminal Procedure Code (V of 1898)</b>	
Subsequently, on an objection taken under s. 42 of the Specific Relief Act by the principal defendant at the hearing of the suit, a prayer was added in the plaint for an injunction prohibiting the principal defendant from interfering with the plaintiff performing his duties as <i>shebait</i> and managing the <i>debutter</i> properties, and a further <i>ad valorem</i> fee was paid by the plaintiff under Schedule I, read with s. 7 ( <i>iv</i> ) ( <i>d</i> ) of the Court-fees Act, for the injunction. The Court of first instance having heard the suit and dismissed it on the merits, the plaintiff appealed to the High Court, and upon the memorandum of appeal he paid court-fees in the same manner as in the Court of first instance: <i>Hell</i> , that the prayer for injunction was arbitrarily undervalued, that its value was the value of the relief claimed, and that the plaintiff was bound to pay <i>ad valorem</i> court-fees upon the plaint and memorandum of appeal on the basis that the value of the relief claimed was Rs. 11,005. <i>Umatal Batul v. Nanji Koer</i> , 11 C. W. N. 705; 6 C. L. J. 427; <i>Dayaram Sagjivan v. Gordhandas Dayaram</i> , I. L. R. 31 Bom. 73; and <i>Boidya Nath Adya v. Mahan Lal Adya</i> , I. L. R. 17 Cal. 680, referred to. <i>RAJ KRISHNA DEY v. BIPIN BHARY DEY</i> (1912), I. L. R. 40 Cal. 245		<b>ss. 110, 118, 367, 424: See PRACTICE</b>	376
<b>Court-fees Act (VII of 1870), s. 7: See</b>		<b>s. 145: DISPUTE CONCERNING LAND ...</b>	982
<b>COURT-FEE ...</b>	615	<b>ss. 146, 148: See ATTACHMENT ...</b>	105
<b>(iv), (c): See COURT-FEE ...</b>	245	<b>s. 146(2): See RECEIVER ...</b>	862
<b>Court of Wards: See CENTRAL PROVINCES GOVERNMENT WARDS ACT, s. 18 ...</b>	784	<b>s. 164: See CONFESSION ...</b>	873
<b>Criminal Breach of Trust: See AGREEMENT AGAINST PUBLIC POLICY ...</b>	113	<b>ss. 173, 190(1)(b): See COGNIZANCE ...</b>	854
<b>See CHARGE ...</b>	318	<b>s. 190(c): See JURISDICTION OF CRIMINAL COURT ...</b>	71
<b>Criminal Procedure Code (V of 1898)</b>		<b>s. 195: See SANCTION FOR PROSECUTION ...</b>	37, 423, 584
<b>ss. 35(3), 413: See APPEAL ...</b>	631	<b>s. 195(b): See SANCTION FOR PROSECUTION ...</b>	239
<b>s. 109: See OSTENSIBLE MEANS OF SUBSISTENCE ...</b>	702	<b>ss. 195, 476, 532, 537: See JURISDICTION OF CRIMINAL COURT ...</b>	360
		<b>ss. 202, 476: See COMPLAINT, DISMISSAL OF ...</b>	441
		<b>s. 203: See CRIMINAL REVISION ...</b>	41
		<b>s. 233: See CHARGE ...</b>	846
		<b>ss. 233 to 235 ...</b>	318
		<b>ss. 297, 303: See JURY, TRIAL BY ...</b>	367
		<b>ss. 309, 403, 423, 439: See ASSESSORS, EXAMINATION OF ...</b>	163
		<b>ss. 439, 476: See HIGH COURT, JURISDICTION OF ...</b>	477
		<b>s. 476: See COLLECTOR ...</b>	465
		<b>ss. 535, 337(a): See CHARGE ...</b>	168

	PAGE.
<b>Criminal Revision</b> — <i>Dismissal of complaint, reasons for</i> — <i>Criminal Procedure Code, (Act V of 1898), s. 203</i> — <i>Grounds not taken in the first Court of Revision might be taken in the High Court</i> — <i>Government Circular, its, effect</i> — <i>Statute law</i> — <i>Practice</i> . Grounds, which were not urged in the first Court of Revision, might be taken in the High Court. Under s. 203 of the Criminal Procedure Code (Act V of 1898) reason for dismissing the complaint must be recorded. No circular of the Government can authorize Magistrates to infringe, or in any way alter, the statute law. <i>MANIRUDDIN SIRCAR v. ABDUL RAUF</i> (1912), I. L. R. 40 Calc. ... .. 41	
<b>Cumulative Sentences</b> — <i>Rioting</i> — <i>Separate sentences for rioting and causing hurt</i> — <i>Penal Code (Act XLV of 1860), ss. 147, 323</i> . Separate sentences for the offences of rioting and hurt are legal where it is found that each person took an individual part in the assault. <i>Nilmony Poddar v. Queen-Empress</i> , I. L. R. 16 Calc. 442, <i>Mohur Mir v. Queen-Empress</i> , I. L. R. 16 Calc. 725, <i>Ferasat v. Queen-Empress</i> , I. L. R. 19 Calc. 105, referred to. <i>RAM ANGUTHA SINGH v. EMPEROR</i> (1913) I. L. R. 40 Calc. ... 511	
<b>Custom</b> : See <i>ADOPTION</i> ... .. 879	
— See <i>AGARWAL BANIAS OF ZIRA</i> 879	
<b>Damdapat, rule of</b> — <i>Decree in mortgage-suit between Hindus</i> — <i>Interest accruing after date fixed for redemption, whether rule applicable to</i> . The rule of damdupat applies to Hindus only so long as the relation between the parties is contractual, and ceases to apply when the matter has passed from the realm of contract into that of judgment. Where a decree has been passed on a mortgage, the rule does not apply to the interest accruing after the date fixed for redemption. <i>In the matter of Hari Lal Mullick</i> , I. L. R. 33 Calc. 1269, followed. <i>Ram Kanye Audhicary v. Cally Churn Dey</i> , I. L. R. 21 Calc.	

<b>Damdapat, rule of</b> — <i>conclld</i> . 840 not followed. <i>Sundar Kuer v. Sham Krishen</i> , I. L. R. 34 Calc. 150 ; L. R. 34 I. A. 9, referred to. <i>NANDA LALL ROY v. DHIRENDRA NATH CHAKRAVARTI</i> , (1913) I. L. R. 40 Calc. ... 710	
<b>Daughter's Son of the great-grandson of the great-great-grandfather</b> : See <i>HINDU LAW</i> — <i>STRIDHAN</i> ... 82	
<b>Declaratory Decree</b> : See <i>COURT-FEE</i> ... 615	
— <i>Suit</i> : See <i>COURT-FEE</i> ... 245	
<b>Decree, form of</b> : See <i>HINDU LAW</i> — <i>ALIENATION</i> ... .. 966	
— See <i>MORTGAGE</i> ... 378	
<b>Deed of Endowment</b> : See <i>RELIGIOUS TRUST</i> ... .. 251	
— <b>Trust, construction of</b> : See <i>TRUST</i> ... .. 232	
<b>Defamation</b> — <i>Statement by accused made in application to District Magistrate for transfer of case</i> — <i>Absolute or qualified privilege</i> — <i>English law, applicability of, in the mofussil</i> — <i>Construction of Statutes</i> — <i>Penal Code (Act XLV of 1860), s. 499</i> . Section 499 of the Penal Code is exhaustive ; and if a defamatory statement does not fall within the specified exceptions, it is not privileged. The English common law doctrine of absolute privilege does not obtain in the mofussil in India. A defamatory statement made in bad faith by an accused, against whom a trial is pending in a Criminal Court, and contained in a petition to the District Magistrate for a transfer of the case, is not absolutely privileged, but is punishable under s. 499 of the Penal Code : <i>Green v. Delanney</i> , 14 W. R. Cr. 27 ; <i>Augada Ram Shaha, v. Nemai Chand Shaha</i> , I. L. R. 23 Calc. 867 ; and <i>Kali Nath Gupta v. Gobind Chandra Basu</i> , 5 C. W. N. 293, followed. <i>Potaraju Venkata Reddy v. Emperor</i> 13 Cr. L. J. 275, dissented from. <i>Babu Ganesht Dutt Singh v. Mugneeram Chowdhry</i> , 11 B. L. R. 321 ; <i>Bhikumber Singh v. Becharam Sircar</i> , I. L. R. 15 Calc. 264 ; <i>Woolfun Bibi v. Jesarat Sheikh</i> ,	



	PAGE.		PAGE.
<b>Defamation—concl'd.</b>		<b>Dishonestly receiving stolen property—</b>	
I. L. R. 27 Calc. 262 ; <i>Golap Jan v. Bholanath Khetry</i> , I. L. R. 38 Calc. 880, distinguished. <i>Haider Ali v. Abdu Mia</i> , I. L. R. 32 Calc. 756, referred to. <i>Kari Singh v. Emperor</i> , I. L. R. 40 Calc. 441 (note), explained. The proper course in constructing an Act is to ascertain the natural meaning of its language, and not to assume that it was intended to leave the existing law unaltered, except when such intention is stated : <i>Bank of England v. Vagliano</i> , [1891] A. C. 107, and <i>Norendra Nath Sircar v. Kamalbasini Dasi</i> , I. L. R. 23 Calc. 563, followed. The essence of a Code is to be exhaustive in the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or to go outside the letter of the enactment according to its true construction : <i>Gokul Mandar v. Pudmanund Singh</i> , I. L. R. 29 Calc. 707, followed. <i>KARI SINGH v. EMPEROR</i> (1912) I. L. R. 40 Calc. 433	433	<i>Receipt of property—Production of the railway receipt, payment of freight and taking of formal delivery—Property not actually removed, or attempted to be removed, from railway premises—Penal Code (Act XLV of 1860), s. 411. Where the consignee presented a railway receipt for certain stolen goods to the station-master, paid the freight and received formal delivery of the package from the latter : Held, that the goods had come to be not merely in the potential possession of the consignee, but actually within his power and unrestricted control, though he had not removed them from the station, where they were then lying, nor made any attempt to do so, and that he had received them within s. 411 of the Penal Code. Reg v. Hill, 3 Cox. C. C. 533 ; 1 Den. C. C. 453, distinguished. SHEWDHAR SIKUL v. EMPEROR (1913) I. L. R. 40 Calc. ...</i>	990
<b>Defendants' right to offer evidence : See PRACTICE ...</b>	119	<b>Dismissal of Complaint, reasons for : See CRIMINAL REVISION ...</b>	41
<b>Delegation, Nazir's power of : See ATTACHMENT ...</b>	849	<b>Dispute, concerning land—<i>Ijmali property</i>—Claim by co-sharers to exclusive possession of specific plots—Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898), s. 145. A Magistrate has jurisdiction, under s. 145 of the Criminal Procedure Code, in the case of <i>ijmali</i> land, where each party claims to be in exclusive possession of specific portions of the same. Under s. 145 the question for the Magistrate's decision is not whether the parties have a title to possession jointly, or a title to possession separately, but whether either of them is in actual possession. Co-sharers in an <i>ijmali</i> estate may, by express or tacit arrangement, be each separately in actual possession of specific or demarcated portions of the same, and s. 145 applies to such a case. When, however, the parties are found to be not constructively but actually in joint possession, the section has no application. <i>Makhan Lal Roy v. Barada Kanta Roy</i>, 11</b>	
<b>Delivery : See SALE OF GOODS ...</b>	523		
<b>——, taking of : See DISHONESTLY RECEIVING STOLEN PROPERTY ...</b>	990		
<b>Deposit by Judgment-debtor : See RATEABLE DISTRIBUTION ...</b>	619		
<b>Deputy Collector : See COLLECTOR ...</b>	465		
<b>Deputy Commissioner, order of : See HIGH COURT, JURISDICTION OF ...</b>	518		
<b>—— Magistrate : See PUNITIVE POLICE ...</b>	452		
<b>Discharge, order of, by High Court : See JURISDICTION OF CRIMINAL COURT ...</b>	71		
<b>—— by Attorney : See ATTORNEY AND CLIENT ...</b>	386		
<b>Discretion : See PLEADERSHIP EXAMINATION ...</b>	588		
<b>—— of Trustee : See RELIGIOUS TRUST ...</b>	232		

	PAGE.		PAGE.
<b>Dispute, concerning land—concl'd.</b>		<b>Ejectment—concl'd.</b>	
C. W. N. 512, explained and distinguished. <i>Per</i> Harington J. Where a party alleges exclusive possession and acquiesces in the hearing of the case on that footing, he cannot afterwards be heard to say that the whole proceedings are bad because the land is <i>ijmali</i> BASANTA KUMARI DAS v. MAHESH CHANDRA LAHA (1913) I. L. R. 40 Calc. ... ..	982	of tenancy created by contract or custom—Verbal notice, sufficiency of. Where a raiyat sued an under-raiyat in ejectment and got a decree but, on appeal the Judicial Commissioner of Chota Nagpur dismissed his suit on the ground that the provisions of s. 41 of the Chota Nagpur Tenancy Act had not been complied with, as an under-raiyat has at least the rights of a non-occupancy raiyat: <i>Held</i> , that the view taken by the Judicial Commissioner was erroneous. An under-raiyat must, for the purposes of that Act, be treated as belonging to a class of tenants quite distinct from the class of non-occupancy raiyats. Those portions of that Act which dealt with tenants generally could be applied to under-raiyats. In a suit for ejectment of an under-raiyat by a raiyat, the Court can have regard only to the relations established between the parties either by contract or custom. Where there is no evidence of a lease, the tenancy would no doubt be ordinarily held to be a tenancy from year to year. There is no statutory provision that the tenancy of an under-raiyat in Chota Nagpur can be terminated only by a notice in writing. GURU CHARAN HAJAM v. SUKLAL HAJAM, (1913) I. L. R. 40 Calc. ... ..	858
<b>Distribution, period of :</b> See HINDU LAW		<b>Election :</b> See SALE OF GOODS ...	523
—WILL ... ..	274	<b>Encumbrance :</b> See EXECUTION OF DECREE	623
<b>Divorce—Husband's petition—Foreign domicile—Divorce Act (IV of 1869)—Territorial jurisdiction.</b> The husband, who was an Italian subject with an Italian domicile, instituted proceedings for divorce on the ground of his wife's adultery. The marriage had been solemnized in India, and the parties were residing in British India: <i>Held</i> , that, under the provisions of the Indian Divorce Act, the Court was bound to grant a divorce on proof of adultery, although the divorce would have no effect outside India. <i>LeMesurier v. LeMesurier</i> , [1895] A. C. 517, and <i>Shaw v. Gould</i> , L. R. 3 E. & I. App. 55, referred to. GIORDANO v. GIORDANO (1912) I. L. R. 40 Calc. ... ..	215	<b>Endowment :</b> See COURT-FEE ...	245
—Act (IV of 1869) : See DIVORCE ...	215	—See MAHOMEDAN LAW—	
<b>Domicile :</b> See DIVORCE ...	215	ENDOWMENT ... ..	297
<b>Easement—Flow of water over servient tenement in a definite channel, if necessary for acquiring right of easement.</b> The fact that water flows over the surface of the servient tenement without a definite channel for its carriage, cannot prevent the acquisition of an easement. <i>Bidhoo Bhushan Palit v. Beny Madhab Mazumdar</i> , 8 C. W. N. 244, overruled. <i>MUNSHI MISSEER v. BHIMRAJ RAM</i> (1913), I. L. R. 40 Calc. ... ..	458	—See RELIGIOUS TRUST ...	251
<b>Ejectment—Chota Nagpur Tenancy Act (Beng. VI of 1908), ss. 4(3), 41—Nonoccupancy raiyats—Under raiyats, ejectment of—Transfer of Property Act (IV of 1882), s. 106—Incidents</b>		<b>English Law, applicability of :</b> See DEFAMATION ... ..	438
		<b>Enhancement of Rent :</b> See CHOTA NAGPUR TENANCY ACT, 1908, s. 27 ...	518
		—See SUIT ... ..	428
		—Bengal Tenancy Act (VIII of 1885), s. 30—Landlord of a holding, meaning of—Res. judicata—Civil Procedure Code (Act XIV of	

**Enhancement of Rent—concl'd.**

1882), s. 13—*Matter directly and substantially in issue, what constitutes.* The plaintiff and the defendants were howladars of a property. The defendants took a raiyati lease from the plaintiff of his undivided share of the howla. Upon a suit brought by the plaintiff under s. 30 of the Bengal Tenancy Act for enhancement of rent against the defendant: *Held*, that the plaintiff was not the landlord of a "holding" within the meaning of s. 30 of the Act, and as such the suit was liable to be dismissed. *Haribole Brohmo v. Tassimuddin Mondul*, 2 C. W. N. 680, followed. In a previous suit between the parties for enhancement of rent it was decided that the plaintiff had the right to enhance the rent of the defendants; but the suit was dismissed on the ground that the rent paid by the defendants, was not lower than the rate at which rent was paid by tenants of adjoining lands. In a subsequent suit between the same parties, the question was raised by the plaintiff that his right to enhance the rent of the defendants was *res judicata*: *Held*, that inasmuch as the decision upon the question of the right of the plaintiff to enhance the rent was not the basis of the decree ultimately made in the previous suit, it was not *res judicata* between the parties. *PARBATI DEBI v. MATHURA NATH BANERJEE* (1912), I. L. R. 40 Cal. ... 29

**Error, omission or irregularity: See**

CHARGE ...	... 168
— of Law: See CHARGE ...	... 168
<b>Estoppel: See ADVERSE POSSESSION</b> ...	... 173
— See MORTGAGE ...	... 534
— See NOTICE ...	... 503
— See TRADE-MARK ...	... 814
— by Conduct: See MORTGAGE ...	... 378
<b>Evidence: See JURY, TRIAL BY</b> ...	... 367
— See PRACTICE ...	... 119

— *Evidence Act (I of 1872), s. 122—"Representative in interest" Dis-*

## PAGE.

**Evidence—concl'd.**

## PAGE.

*closure by wife of communications made by deceased husband during marriage.* Where there is no "representative in interest" who can consent, under s. 122 of the Evidence Act, to the disclosure of communications made by a deceased husband to his wife during marriage, the wife should not be permitted, even if willing, to disclose such communications. The widow of a deceased husband is not his "representative in interest" for the purpose of giving such consent. *NAWAB HOWLADAR v. EMPEROR*, (1913) I. L. R. 40 Cal. ... 891

— **Act (I of 1872) ss. 3, 114 III., (g), 125): See LIMITATION** ... 898

— **MORTGAGE ... s. 106: See** ... 342

— **ADVERSE POSSESSION ... s. 115: See** ... 173

— **TRADE-MARK ... s. 117: See** ... 814

— **EVIDENCE ... s. 122: See** ... 891

— **for the Defence: See PRACTICE** 376

— **of Jurors: See JURY, TRIAL BY** 693

**Evidentiary Value: See CONFESSION** ... 873

**Execution of Decree—Mortgage-decree passed before the Code of 1908—Application for execution made after the Code of 1908 came into force, if governed by the new Code—Civil Procedure Code (Act V of 1908), ss. 1(2), 48, 154—General Clauses Act (X of 1897), s. 6.** S. 48 of the new Code of Civil Procedure (Act V of 1908) governs an application for the execution of a mortgage-decree obtained even before that Code came into force. S. 154 of the new Code clearly contemplates a retrospective effect of the Code and an interference with rights acquired under the old Code. S. 1, cl. (2) of the new Code afforded ample opportunity to all persons having rights under the old Code to enforce them before the new Code came into operation. *Kaunsilla v.*

	PAGE.
<b>Execution of Decree—contd.</b>	
<i>Ishri Singh, I. L. R. 32 All. 499, not followed. BISSESWAR SONAMUT v. JASODA LAL CHOWDHRY (1913) I. L. R. 40 Calc. ...</i>	704

*Notice of execution—Sale—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 22 and 90—Omission to serve notice, effect of—Whether subsequent sale void—Question relating to execution of decree—Second appeal.* Omission to serve a notice under the provisions of O. XXI, r. 22 of the Civil Procedure Code is not by itself sufficient to render a sale, which has been subsequently held, void. *Sakdeo Pandey v. Ghasiram Gyawal, I L. R. 21 Calc. 19, not followed.* Though an application to set aside a sale on the ground that no notice had been served as required by O. XXI, r. 22 of the Civil Procedure Code, is one which cannot be made under the provisions of O. XXI, r. 90 of the Code, but must be one made under the provisions of s. 47 of the Code; still in order to justify a Court in setting aside a sale on the ground of the omission to serve a notice under O. XXI, r. 22, it must be proved that the omission to serve such notice has resulted in substantial injury to the owner of the property sold. *Lakshmi Charan Sen v. Sris Chandra Roy, 13 C. L. J. 162, referred to.* A second appeal lies from an order passed on appeal on an application to set aside a sale on the ground, that no notice had been served as required by O. XXI, r. 22 of the Code. *KUMED BEWA v. PRASANNA KUMAR ROY (1912) I. L. R. 40 Calc. ...*

45

*Rent decrees—Sale—Encumbrances by way of maintenance grant—Portion of tenure in charge of the Encumbered Estates Act—Authorities exempted from sale by Commissioner—Effect of the order of exemption—Chota Nagpur Landlord and Tenant Procedure Act (Beng. I of 1879), s. 123—Chota Nagpur Tenancy Act (Beng. VI of 1908), s. 208—General Clauses Act (Beng. I*

	PAGE.
<b>Execution of Decree—contd.</b>	
<i>of 1899), s. 8, cl. (e)—Rent Recovery Act (Beng. VIII of 1865), ss. 4, 5 and 16.</i> When an application in execution of a rent decree was made for the sale of all the villages comprised in a tenure, but the Commissioner, for reasons sufficient in his opinion, directed the exemption of some of the villages from the sale: <i>Held</i> , that the decree-holder was not deprived of his right to execute his decree, which must be executed as a decree for rent against the unexempted portion of the tenure under the Bengal Rent Recovery Act of 1865. The effect of a sale of the unexempted portion would be to pass the property to the purchaser free of all encumbrances. <i>Dicarlath Chuckerbutty v. Dhun Monee Chondhrain, 15 W. R. 524, Sham Chand Mitter v. Juggut Chandra Sircar, 22 W. R. 541, referred to.</i> <i>MADANMOHAN NATH SAHI DEO v. PROTAP UDAI NATH SAHI DEO, (1912) I. L. R. 40 Calc. ...</i>	628
<b>Execution Proceedings : See MESNE PROFITS ...</b>	56
<b>False Charge to Police : See JURISDICTION OF CRIMINAL COURT ...</b>	360
<b>Falsification of Accounts : See CHARGE ...</b>	318
<b>Family Purpose : See MORTGAGE ...</b>	342
<b>Female Members : See MORTGAGE ...</b>	378
<b>Foreign Domicile : See DIVORCE ...</b>	215
<b>Forfeiture : See LANDLORD AND TENANT ...</b>	870
<b>Fresh Proceedings : See JURISDICTION OF CRIMINAL COURT ...</b>	71
<b>General Clauses Act (X of 1897), s. 6 : See EXECUTION OF DECREE ...</b>	704
<b>General Clauses Act (Beng. 1 of 1899) s. 8, cl. (e) See EXECUTION OF DECREE ...</b>	623
<b>Ghatwall tenure : See ADVERSE POSSESSION ...</b>	173
<b>Gift-over : See WILL ...</b>	192
<b>Gift (absolute) to son : See HINDU LAW—WILL ...</b>	274

	PAGE.		PAGE.
<b>Government, share of :</b> See LAND ACQUISITION—COMPENSATION ..	64	<b>High Court, jurisdiction of—</b> <i>contd.</i>	
————, <b>Circular, effect of :</b> See CRIMINAL REVISION ..	41	jurisdiction to interfere in cases where the Courts of Collectors have either exceeded the jurisdiction or failed or refused to exercise the jurisdiction vested in them by the Chota Nagpur Tenancy Act: <i>Chaitan Patgosi Mahapatra v. Kunja Behari Patnaik</i> , I. L. R. 38 Calc. 832, referred to. <i>KARTIK CHANDRA OJHA v. GORA CHAND MAHTO</i> (1913) I. L. R. 40 Calc. ...	518
————, <b>of India Act 1858 (21 &amp; 22 Vict. c. 105), ss. 65 to 66 :</b> See JURISDICTION OF CIVIL COURT ..	391	Order under s. 476 of the Criminal Procedure Code by Settlement Officer— <i>Whether civil appellate or criminal appellate side can revise—Criminal Procedure Code (Act V of 1898), s. 439—Civil Procedure Code (Act V of 1908), s. 115—High Courts Act (24 &amp; 25 Vict. c. 104), ss. 14 and 15.</i> In the case of an order passed by a Civil or Revenue Court under s. 476 of the Criminal Procedure Code—(i) S. 439 of the Criminal Procedure Code has no application; (ii) The High Court can exercise the powers vested in it by s. 115 of the Civil Procedure Code or s. 15 of the High Courts Act; and (iii) The Bench of the High Court exercising criminal jurisdiction cannot, as such, deal with the matter on revision, but the Judges composing that Bench may do so, if authorized by the Chief Justice under s. 14 of the High Courts Act: <i>Kali Prosad Chatterjee v. Bhulan Mohini Dasi</i> , 8 C. W. N. 73, and <i>Emperor v. Gopal Barik</i> , I. L. R. 34 Calc. 42, considered and approved of to a certain extent. <i>EMPEROR v. HAR PRASAD DAS</i> (1913), I. L. R. 40 Calc. ...	477
<b>Grantor and Grantee :</b> See ADVERSE POSSESSION ..	173	<i>of Execution—Inherent Powers of Court—Special leave to appeal to the Privy Council—Civil Procedure Code (Act V of 1908), ss. 112 and 151; O. XLI. r. 5 (2)—Letters Patent, 1865, cl. 36.</i> The High Court is competent to make an order for stay of proceedings in execution of its decree in view of an application by the judgment-debtor to the Judicial	
<b>Grave-yard :</b> See MAHOMEDAN LAW—ENDOWMENT ..	297		
———— : <i>Trespass—Erection of a shed over a visible grave in a disused private grave-yard Penal Code (Act XLV of 1860), s. 297.</i> The erection of a shed over a visible grave belonging to the complainant's family in a disused grave-yard, claimed to be private property of the trespasser, with the knowledge that the feelings of the complainant would be likely to be thereby wounded, is an offence under s. 297 of the Penal Code. <i>Per RICHARDSON, J.</i> The word "trespass" in s. 297 has not the same meaning as "criminal trespass" in s. 441 of the Code, but implies any violent or injurious act committed in the place, and with the knowledge or intent defined in s. 297. <i>JHULAN SAIN v. EMPEROR</i> (1913), I. L. R. 40 Calc. ...	548		
<b>Grounds of Revision :</b> See CRIMINAL REVISION ..	41		
<b>Half Sister's Son of Widow :</b> See HINDU LAW—STRIDDHAN ..	82		
<b>High Court, jurisdiction of—</b> <i>Chota Nagpur Tenancy Act (Beng. VI of 1908), s. 27—Application for enhancement of rent—Jurisdiction of the High Court to set aside an order of Deputy Commissioner, passed without jurisdiction, on appeal from an order of Deputy Collector—Judicial proceedings. Proceedings on applications for enhancement of rent under s. 27 of the Chota Nagpur Tenancy Act are judicial proceedings, and Deputy Commissioners in the performance of their judicial duties under the Act are Courts subject to the appellate jurisdiction of the High Court. The High Court has</i>			

	PAGE.
<b>High Court, Jurisdiction of—concl'd.</b>	
Committee for special leave to appeal to His Majesty in Council, <i>Hurro Chunder Roy Chowdhry v. Shoorodhoney Debia</i> , 9 W. R. 402, <i>Panchanan Singha Roy v. Dwarka Nath Roy</i> , 3 C. L. J. 29, <i>Hukum Chand Boid v. Kamalanand Singh</i> , I. L. R. 33 Calc. 927; 3 C. L. J. 67, <i>Mahomed Wahiduddin v. Hakimian</i> , I. L. R. 25 Calc. 757, <i>Tara Pado Ghose v. Kamini Dassi</i> , I. L. R. 29 Calc. 644, <i>Mahadeo v. Budhai Ram</i> , I. L. R. 26 All. 358, <i>Gajju v. King Emperor</i> , 2 All. L. J. 173, <i>Brij Coomaree v. Ramrik Dass</i> , 5 C. W. N. 781, <i>Nityamoni Dasi v. Madhu Sudan Sen</i> , I. L. R. 38 Calc. 335; L. R. 38 I. A. 74, referred to. <b>NANDA KISHORE SINGH v. RAM GOLAM SAHU (1912)</b> I. L. R. 40 Calc. ... 955	

<b>High Courts Act (24 &amp; 25 Vict. c. 104), ss. 14 15 : See HIGH COURT, JURISDICTION OF</b> ... 477	
--	--

<b>Hindu Joint Family : See CENTRAL PROVINCES GOVERNMENT WARDS ACT, s. 18</b> ... 784	
---	--

**Hindu Law—Alienation—Alienation by father in favour of adopted son in family whose adoption alleged to be illegal—Form of suit—Suit for partition in case of stranger in Hindu family—Inaction and acquiescence of father of joint family how far binding on sons—Limitation—Minority—Form of decree.** In a suit instituted in 1907 by members of a Hindu joint family governed by the Mitakshara law to set aside their father's alienation of ancestral property, against the assignee, the first respondent, the father being made a *pro forma* defendant, the appellants alleged that their father improperly made in 1898 a disposition of a specific portion of the property to the respondent who had been adopted by the widow of one or two brothers (with the consent of the other) from whom their father (the adopted son of the other brother) inherited the family property; and they contended that the adoption of the first respondent was invalid for various,

### Hindu Law—cont'd.

reasons, and that they were entitled to recover the property alienated. The defence, so far as material, was that the appellants were bound by the acquiescence of their father in admitting the first respondent to the family, and that the suit was barred by limitation. The respondents also objected to the form of the suit which they contended should have been for partition. At the settlement of issues the appellants' pleader admitted "that their father had actually given possession in 1898 of the property in suit to the first respondent to enjoy it exclusively: previously, since 1887, he was living as a joint member of the family, and jointly enjoying the profits by reason of the inaction and acquiescence of the appellants' father in that mode of enjoyment." The suit was decided without evidence on that admission, and on the allegations in the plaint and written statements, and was dismissed, and that decree was affirmed on appeal. *Held*, as to the form of suit, that to deny any relief except in a suit for partition would be to deny the right to relief altogether, since the basis of the claim was that the appellants were entitled to the estate as a joint and undivided estate, and desired to enjoy it as such. Also it might be that the first respondent was entitled to stand in the shoes of the appellants' father as to the share which would come to the latter on a partition; and if he established such a position, the Court would at the instance of the respondent decree a partition between the appellants and their father. Without therefore expressing any opinion as to its validity in law or fact, their Lordships thought that, on the pleadings, it was open to the first respondent to set up such a case. *Held*, also, that though a partition made by a Hindu father may under some circumstances bind his minor sons [as in *Balkishen Das v. Ram Narain Sahu*, I. L. R., 30 Calc., 738; L. R., 30 I. A., 139] yet if on the partition a share is given to

**Hindu Law—concl'd.**

an absolute stranger (as the first respondent would be if his adoption were invalid) the partition may be impeached as a disposition of property made without consideration unless it can be supported as a *bonâ fide* compromise of a disputed claim. If, therefore, the adoption of the first respondent were wholly invalid the appellants were entitled to succeed in the absence of any other defence. The Appellate Court as to limitation had decided that the suit was not barred as against the first appellant but only as against the rest of the appellants who were minors, and had not been born at the time (1887) when it was alleged the adverse possession began to run. *Held*, that if the first appellant was entitled to relief the other appellants would also be so entitled. Under the circumstances, their Lordship, in allowing the appeal, were of opinion that they could not, on the materials before them finally determine the rights of the parties, and remanded the case for trial with a declaration that it was competent to the Court, in the event of the first respondent failing in his other defences to make the whole or any part of the relief granted to the appellants conditional on their assenting to a partition so far as regarded the father's interest in the estate, so as to give effect to any right to which the first respondent might be entitled claiming through his assignor. *RAMKISHORE KEDARNATH v. JAINARAYAN RAMRACHHPAL*, (1913) I. L. R. 40 Calc. ... 966

—**Alienation—Custom of agriculturists in the Panjab—Ancestral land—Power of father to alienate—Necessity—"Just debts"—Burden of proof—Debts of proprietor incurred by reckless extravagance and for illegal or immoral purposes.** In a suit by the respondents to have set aside an alienation of part of the family property made by their father in favour of the appellant, alleging that by the custom of agriculturists in the Panjab he was not

**Hindu Law—cont'd.**

competent to sell ancestral land without necessity, that there had been no necessity for the sale, that their father was a debauchee and an extravagant person, and that the debts for which the sale was made were incurred for immoral and illegal purposes, the appellant did not deny the custom though he traversed all the other allegations in the plaint, and contended that, the alienation having been made for their father's antecedent debts, it was for the respondents to show that the debts were contracted for illegal or immoral purposes. There were concurrent findings by the Courts below that the respondents' father was recklessly extravagant and did not know how to manage his affairs properly, and that certain specific debts were "just debts," and others were not: *Held* (affirming the decision of the Chief Court of the Panjab), that the custom set up, not being disputed, was applicable to the case, that the payment of a "just debt" by the male proprietor of lands to which the custom applied was a necessity for which he could validly alienate ancestral property, and that the respondents were entitled to possession of the property sued for on re-payment to the appellant of such part of the purchase-money as both Courts concurrently found to be just debts, the payment of which was a necessity. The ruling in *Deri Ditta v. Saudagar Singh*, (1900) Punjab Rec. No. 65, that a "just debt" means "a debt which is actually due, and is not immoral, illegal or opposed to public policy, and has not been contracted as an act of reckless extravagance or of wanton waste, or with the intention of destroying the interests of the reversioners," was approved of by their Lordships of the Judicial Committee. *KIRPAL SINGH v. BALWANT SINGH* (1912), I. L. R. 40 Calc. ... 288

—**Alienation—Mortgage by widow of part of the estate—Legal necessity—Presumption—Reversioner,**

**Hindu Law—*con'd.***

Alienation by way of mortgage by a Hindu widow, as heiress, of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable enquiry and honest belief as to its existence, but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or of reasonable enquiry and honest belief raised by such consent is not rebutted by more cogent proof. *Nobokishore Sarma Roy v. Hari Nath Sarma Roy*, I. L. R. 10 Calc. 1102, considered. *Bajrangi Sing v. Manokarnika Bakhsh*, I. L. R. 30 All. 1; I. R. 35 I. A. 1, referred to. *DEBI PROSAD CHOWDHURY v. GOLAP BHAGAT* (1913), I. L. R. 40 Calc. ... 721

**—Inheritance—Ascetics—**

*Sudras—Rules relating to ascetic persons of the Sudra caste.* A *Sudra* cannot enter the order of *yati* or *sannyasi*, and therefore a *Sudra* who becomes an ascetic is not excluded from inheritance to his family estate unless some usage is proved to the contrary: *Dharampuram v. Virapantiyam*, I. L. R. 22 Mad. 302, followed *HARISH CHANDRA ROY v. ATIR MAHMUD* (1913), I. L. R. 40 Calc. ... 545

**—Joint family—Mitakshara**

*—Coparcenership—Presumption as to law governing family settling in province other than that of its origin—Transfer of the ancestral property—Liability of sons to pay the debts of their father—Conversion of some of the sons to Christianity, effect of—Status—Limitation—Removal of Caste Disabilities Act (XXI of 1860).* The plaintiffs and the defendants Nos. 5 to 7 and the husbands of the defendants Nos. 8 and 9 were the sons of one Amrita Lal Pandey, whose father, a Hindu governed by the Mitakshara law, was originally a resident of Oudh, but subsequently migrated to and settled in the district of Bankura where he

**Hindu Law—*cont'd.***

acquired properties and continued to live jointly with his family. The defendants Nos. 1 to 4 were the transferees of the ancestral property which formed the subject-matter of this suit. On the 19th March 1900 Amrita Lal Pandey executed a deed of conveyance, whereby he transferred his ancestral property to the defendants Nos. 1 to 4, in satisfaction of certain debts incurred by him in 1892 and 1895. He was joined in this conveyance by the defendants Nos. 5 to 7. On the 26th December 1900 Amrita Lal Pandey died, leaving him surviving six sons, viz., the plaintiffs and defendants Nos. 5 to 7, as also the widows of his two sons who had predeceased him in 1880 and 1883, respectively. Of the six sons, the plaintiffs Nos. 1 and 2 had been converted to Christianity in 1890 and 1896 respectively, the defendant No. 5 became a convert to the same faith in 1904, and the plaintiff No. 3 attained his majority in 1902. On the 19th March 1907 the plaintiffs filed their suit against the defendants Nos. 1 to 4 for a declaration of the plaintiffs' title to a three-seventh share of the ancestral property and for recovery of *khass* possession and mesne profits, and made the defendants Nos. 5 to 9 *pro forma* defendants: *Held*, that when the grandfather of the plaintiffs migrated from Oudh to Bengal, the presumption was that he carried with him the laws and customs as to succession and family relations prevailing in the province from which he came. Such a presumption might, however, have been rebutted by proof that the family had adopted the law and usages of the place to which he had migrated. *Held*, also, that in 1890, by reason of his conversion to Christianity, the first plaintiff ceased to be a member of the joint Hindu family, but that thenceforward he continued to hold the ancestral property as joint owner, and was entitled to recover possession of one-seventh share of the property



**Hindu Law—contd.**

on the basis that in 1890, upon the dissolution of the family, he became entitled to such share: *Jalbbhai Ardeshir Shet v. Louis Manuel*, I. L. R. 19 Bom. 680, and *Lastings v. Gonsalves*, I. L. R. 23 Bom. 539, distinguished. *Held*, further, that the second plaintiff, upon his conversion to Christianity in 1896, ceased to be a member of the joint family, and was not bound by the conveyance of the 19th March 1900, but that he was liable to satisfy the debts of his father incurred and charged upon the ancestral property prior to the date of his conversion. *Ram Pershad Singh v. Lakhpati Koer*, I. L. R. 30 Calc. 231, *Balabux v. Rukhmabai*, I. L. R. 30 Calc. 725, and *Balkishen Das v. Ram Narain Sahu*, I. L. R. 30 Calc. 738, distinguished. *Held*, further, that Amrita Lal Pandey was competent in 1900 to alienate the ancestral property in his hands, not merely in respect of his own interest, but also that of the third plaintiff. *KULADA PRASAD v. HARIPADA CHATTERJEE* (1912) I. L. R. 40 Calc. 407

—*Stridhan—Inheritance—Half-sister's son of Hindu widow—Probate, application for—Daughter's son of the great-grandson of the great-great-grandfather of the testatrix' husband whether preferential heir to half-sister's son.* Under the Dayabhaga School of Hindu law a half-sister's son of a widow is heir to her *stridhan* property, in preference to the daughter's son of the great-grandson of the great-great-grandfather of her husband, and that therefore the latter has no *locus standi* to oppose an application for probate by the former, of a will alleged to have been executed by the said widow in regard to such property. *Dasharathi Kundu v. Bipin Behary Kundu* I. L. R. 32 Calc. 261, and *Bholanath Roy v. Rakhal Dass Mukherji*, I. L. R. 11 Calc. 69, referred to. *Chatoo Kurmi v. Rajaram Tewari*, 11 C. L. J. 124, distinguished. *SHASHI BHUSHAN LAHIRI v. Rajendra NATH JOARDAR* (1912), I. L. R. 40 Calc. ... 82

**Hindu Law—contd.**

*Prostitute's property, succession to.* The mere fact that a Hindu woman has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood; and, consequently, her *stridhan* property passes, upon her death, in the absence of nearer heirs, to her brother's son as an heir under the Bengal school of Hindu law. *Tara Munnee Dossea v. Motee Buneanee*, 7 Mac. Sol. Rep. 325; 8 I. D. (O. S.) 247, *Ramnath Tolapattro v. Durga Sundari Debi*, I. L. R. 4 Calc., 550, *In the goods of Kaminey-money Bewah*, I. L. R. 21 Calc. 697, *Ramananda v. Raikishori Barmani*, I. L. R. 22 Calc. 347, *Sarna Moyee Bewa v. Secretary of State for India*, I. L. R. 25 Calc. 254, and *Sundari Letani v. Pitambhari Letani*, I. L. R. 32 Calc. 871, overruled so far as they hold that tie of blood is destroyed by unchastity or, in the case of a Hindu woman, by her adopting the life of a prostitute. *Bishesur v. Matu Gholam*, 2 All. H. C. 300, *Musammatt Ganga Jati v. Ghasita*, I. L. R. 1 All. 46, *Adeyaya v. Rudrava*, I. L. R. 4 Bom. 1904, *Kojiyadu v. Lakshmi*, I. L. R. 5 Mad. 149, *Subbarya Pillai v. Ramasami Pillai*, I. L. R. 23 Mad. 171, *Bhuthath Mondol v. Secretary of State for India*, 10 C. W. N. 1085, *Sundari Dossee v. Nemye Charan Daw*, 6 C. L. J. 372, and *Tripura Charan Bannerjee v. Harimati Dassi*, I. L. R. 38 Calc. 493, approved. *Sivasangu v. Minal*, I. L. R. 12 Mad. 277, and *Narasanna v. Gungu*, I. L. R. 13 Mad. 133, distinguished and dissented from. *HIRALAL SINGHA v. TRIPURA CHARAN RAY*, (1913), I. L. R. 40 Calc. ... 650

—*Will—Construction of will—Period of distribution of property bequeathed—Succession Act (X of 1865), s. 111—Hindu Wills Act (XXI of 1870)—Absolute gift to son on attaining majority—Bequest contingent on son's death which did not happen till after period of distribution.* The right of the appellant to succeed to

**Hindu Law—concl'd.**

PAGE.

the *shebaitship* of certain *debutter* properties depended on the construction of his grandfather's will, and on the nature of the right which his father took in those properties. After declaring the properties to be *debutter* for the maintenance of the family idol, the testator in his will stated that "my present begotten son" (the appellant's father) "will be *shebait* for performance of the ceremonies." And after making provision for his own death during the minority of his son, in which case his widow was to be the *shebait* as his son's guardian, the testator continued, "and my son on attaining majority will personally conduct the work of the *sheba*. God forbid, if during my life or after my death, my said son dies, then my widow will be the *shebait*, and after her my daughters by her" (the respondents) "will be *shebait*s..... Moreover, for carrying out the directions under this will untill my minor begotten son comes of age, my wife" (and two male persons named) "will be executors and.....on my said begotten son attaining majority the said executors will be discharged, and the said son by continuing in his present faith will go on performing the *sheba*, etc., of the said idol: *Held* (reversing the decision of the High Court), that, on the true construction of the will, there was an absolute gift of the *shebaitship* to the appellant's father on his attaining his majority, and it was not cut down by anything that followed. There were provisions in case of his death as a minor, but no cutting down of the absolute gift to him. The appellant, therefore, and not the respondents, succeeded on the death of the testator's son, who had attained his majority and held the *shebaitship* until his death. *TRIPURARI PAL v. JAGAT TARINI DAS* (1912) I. L. R. 40 Cal. ... 274

**Hindu Widow—Alienation—Setting aside alienation—Compensation to defendant**

**Hindu Widow—concl'd.**

PAGE.

for improvements—Evidence of relationship—Statement in will of widow—Conjectural suggestions as to will in argument in lieu of evidence—Suggestions never made in cross-examination of writer of will. The respondent on the death of a Hindu widow brought a suit as the next heir of her husband to set aside an alienation, made by the widow in favour of the appellant, of property consisting of a house and compound at Delhi. The respondent, who was the son of a daughter of the husband by a former wife (though this was denied by the appellant), produced a will made by the widow five years before the suit, in which she stated "I have no issue or any near relative. Mathu Mal (the respondent) is related to me as a daughter's son (*rishte men nawasa*) and Khairati Lal as my husband's younger brother. These are my relatives on my husband's side." The oral evidence as to the respondent's title was found by their Lordships to be meagre and conflicting. *Held* (affirming the decision of the Chief Court), that the statement in the will was, under the circumstances, conclusive of the respondent's relationship. The widow was the proper person to make such a statement of fact, which was within the scope of her own knowledge; she put forward the respondent in the will as the first person in the order of choice for the performance of the funeral ceremonies; her statement was corroborated by the other relative mentioned in the will, who was a witness in the case, and whose evidence on the matter was against his own interest; and the statement was uncontradicted by any reliable evidence. Mere conjectural suggestions made in argument, that the will had been executed for the purpose of supporting a future claim to be made by the respondent, could not be entertained by their Lordships in lieu of evidence, especially when

PAGE.

PAGE.

**Hindu Widow—concl'd.**

the writer of the will was himself a witness in the case, and no such conjectural considerations were suggested to him in cross-examination. In case of the respondent succeeding, the appellant claimed the value of improvements made by him to the property while he was in possession of it, which included a temple (Rs. 2,700), a well (Rs. 300), an upper storey to the house (Rs. 2,500), and repairs to the house (Rs. 1,500), the whole amounting to Rs. 7,000. *Held* (affirming the decision of the Chief Court and for the reasons given by it), that Rs. 1,400, which represented half the expenditure by the appellant on the well and the upper storey to the house, should be allowed as compensation for the improvements. The real question was, had they enhanced the market value of the property? It was doubtful whether the erection of the temple had done so, and it had not been contended that it had. *KIDAR NATH v. MATHU MAL*, (1913) I. L. R. 40 Cal. ... 555

**Hindu Wills Act (XXI of 1870):** See HINDU LAW—WILL ... 274

**Homestead Land:** See ADVERSE POSSESSION 173

—: See JURISDICTION OF CIVIL COURT ... 402

**Hurt:** See CHARGE ... 168

—: See CUMULATIVE SENTENCES ... 511

**Illegal Cess:** See ARWAB ... 806

—or immoral Debts: See HINDU LAW—ALIENATION ... 288

**Inadvertance:** See REFUND OF COURT-FEE 365

**India Councils Act, 1861 (24 & 25 Vict., c. 67), s. 22:** See JURISDICTION OF CIVIL COURT ... 391

**Indian Legislature:** See PROCESSION ... 470

**Infant Partner:** See SALE OF GOODS ... 523

**Inherent Powers of High Court:** See STAY OF EXECUTION ... 955

**Inheritance:** See HINDU LAW—STRIDHAN 82

**Injunction:** See TRADE-NAME ... 570

**Injunction, prayer for:** See COURT-FEE ... 245

**Injury:** See TRADE-NAME ... 570

**Insolvency:** See RECEIVER ... 678

— *Adjudication, effect of order of—Property situate at Delhi attached by order of District Court of Delhi—Title of Official Assignee—Presidency Towns Insolvency Act (III of 1909), ss. 17, 126—Auxiliary aid—Provincial Insolvency Act (III of 1907), s. 50. Under section 17 of the Presidency Towns Insolvency Act, on the making of an order of adjudication by this Court, the property of the insolvent situate in every part of British India vests in the Official Assignee of Bengal. Official Assignee, Bombay, v. Registrar. Small Cause Court, Amritsar, I. L. R. 37 Cal. 418; L. R. 37 I. A. 86. followed. Where, prior to the order of adjudication by this Court, certain properties at Delhi belonging to the insolvent, were attached under decrees of the District Court of Delhi, and the subsequent application of the Official Assignee of Bengal for realisation of the insolvent's assets so attached was refused by the District Judge, and the properties were thereafter sold in execution, and the sale proceeds brought into the District Court, an order was made under section 126 of the Presidency Towns Insolvency Act, requesting the District Judge of Delhi to act in aid under section 50 of the Provincial Insolvency Act. In re JEWANDAS JHAWAR (1912), I. L. R. 40 Cal. ... 78*

**Insolvency of Purchaser:** See SALE OF GOODS ... 523

**Insurance Company:** See TRADE-NAME ... 570

**Intention to Deceive:** See TRADE-NAME ... 570

**Interest—Usufructuary mortgage—Interest not stipulated for—Charge in the nature of mortgage must be in writing and registered. Where no interest is stipulated for in a mortgage bond, no interest is recoverable. A charge in the nature of mortgage, whether**

	PAGE.
<b>Interest—concl'd.</b>	
for principal or interest, must be expressed in writing and registered, and cannot be raised by implication: <i>Kuttiumma v. Madhava Menon</i> , 11 Mad. L. J. 186, followed; <i>Imdad Hassan v. Badri Prasad</i> , I. L. R., 20 All. 401, distinguished. <i>MAKBUL ALI v. ALI AHMAD</i> (1913), I. L. R. 40 Calc. ... 514	
<b>Irregularity: See JURISDICTION OF CRIMINAL COURT</b> ... 360	
<b>Jewish Law—Marriage-custom "Ketuba," legal effect of—Rights of wife.</b> In a suit brought by a Jewish lady, married in Calcutta, for the recovery from her deceased husband's estate of the sum mentioned in a <i>ketuba</i> , executed on the occasion of their marriage: <i>Held</i> , that the <i>ketuba</i> was a necessary but formal incident of the marriage contract and ceremonial, and created no such right in favour of the widow. <i>JOSHUA v. ARAKIE</i> (1912), I. L. R. 40 Calc. ... 266	
<b>Joint Hindu Family: See INSOLVENCY OF PURCHASER</b> ... 523	
<b>Joint Owners: See NOTICE</b> ... 503	
<b>Joint Trial: See CHARGE</b> ... 318	
<b>Judicial Proceeding: See CHOTA NAGPUR TENANCY ACT, 1908, s. 27</b> ... 518	
<b>Jurisdiction: See COLLECTOR</b> ... 465	
— See COMPLAINT, DISMISSAL OF ... 444	
— See COURT-FEE ... 245, 615	
— See MESNE PROFITS ... 56	
— See SANCTION FOR PROSECUTION ... 37, 423	
— <i>Secretary of State for India in Council—"Dwelt or carry on business or personally work for gain"</i> — <i>Letters Patent, 1865, s. 12.</i> This Court has no jurisdiction to entertain a suit brought against the Secretary of State for India in Council, where the cause of action has arisen wholly outside the ordinary original civil jurisdiction of this Court, on the sole ground that the Secretary of State for India in Council dwelt or carried on business	

**Jurisdiction—cont'd.**

or personally worked for gain within the local limits of Calcutta, the capital of India, at time of the institution of this suit: *Doya Narain Tewary v. The Secretary of State for India*, I. L. R. 14 Calc. 256, followed. *RODRIGUES v. SECRETARY OF STATE FOR INDIA* (1912), I. L. R. 40 Calc. ... 308

**of Civil Court—Revenue Court**

—*Bastu or homestead land—Rent, suit for—Chota Nagpur Tenancy Act (Beng. VI of 1908), s. 139 (3), cl. (a).* The plaintiffs brought a suit in the Civil Court against the defendant for recovery of arrears of *bastu* rent. The defendant contended that as crops were grown on a portion of the *bastu* land, this land was agricultural, and suits in respect thereof were triable exclusively by the Revenue Court under the Chota Nagpur Tenancy Act: *Held*, that the land in respect of which rent was claimed was *bastu* land, and consequently the suit was maintainable in the Civil Court: *Ramdhan Khan v. Haradhun Puramanick*, 12 W. R. 404; *Kalee Kishen Biswas v. Sreemutty Jankee*, 8 W. R. 250; and *Kumood Narain Bhoo v. Purna Chunder Roy*, I. L. R. 4 Calc. 547, referred to. *MIDNAPORE ZEMINDARI Co., LTD., v. MUKTAKESHI DAS* (1912), I. L. R. 40 Calc. 402

*Right of suit against Secretary of State for India in Council—Burma Town and Village Lands Act (Burma Act IV of 1898), s. 41(b)—Act taking away power of subject to sue Government to determine any right to land—Power of Lieutenant-Governor in Council to pass Act—Legislation ultra vires—India Councils Act, 1861 (24 & 25 Vict., c. 67), s. 22—Government of India Act, 1858 (21 & 22 Vict., c. 106), ss. 65, 66, 67. Held (affirming the decision of the majority of a Full Bench of the Chief Court of Lower Burma), that section 41 (b) of the Burma Town and Village Lands Act (Burma Act IV of 1898), which enacted that "no Civil Court shall have jurisdiction to determine any*

**Jurisdiction—concl'd.**

claim to any right over land as against the Government," was *ultra vires* of the Lieutenant-Governor of Burma in Council, and therefore invalid. Section 22 of the India Councils Act, 1861 (24 & 25 Vict., c. 67), provides that the Governor-General in Council shall have no power "to repeal or in any way effect (amongst other matters) any provision of the Government of India Act, 1858 (21 & 22 Vict., c. 106). And the effect of section 65 of the latter Act which enacted that, "All persons .....shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the East India Company," was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East India Company. The words could not be construed in any different sense without reading into them a qualification which is not there, and may well have been deliberately omitted. The question was not one of procedure, but of the power of the Government to take away by legislation the right to proceed against them in a Civil Court in a case involving a right to land; and the suit in this case (for damages for interference with the respondent's property) was one which would have lain against the East India Company. SECRETARY OF STATE FOR INDIA *v.* MOMENT (1912) I. L. R. 40 Cal. ... 391

**Jurisdiction of Criminal Court—Complaint**

—*Irregularity—Criminal Procedure Code* (Act V of 1898), ss. 195, 476, 532, 537—*Order for Prosecution—Penal Code* (Act XLV of 1860), s. 211—*False charge laid before the Police—Police report—Judicial inquiry—Commitment to the Court of Session.* A conviction by the Court of Session cannot be set aside

**Jurisdiction of Criminal Court—concl'd.**

simply on the ground of a defect in the initiation of the proceedings in the Commitment Court or on the ground of some irregularity in the commitment proceedings more especially when that point was not raised in the lower Court. S. 532 of the Criminal Procedure Code would cure such a defect. *Haibat Khan v. Emperor* I. L. R. 33 Cal. 30, distinguished. *Abdul Rahman v. Emperor*, 7 C. L. J. 371, and *Queen Empress v. A Morton and Moortesa Ali*, I. L. R. 9 Bom. 288, referred to. Recommendation for prosecution by a Police officer under s. 211 of the Penal Code comes within the meaning of the word "complaint" as used in s. 195 of the Criminal Procedure Code, as that section clearly contemplates prosecution at the instance of Police officers. *DILAN SINGH v. EMPEROR* (1912), I. L. R. 40 Cal. ... 360

—*Order of discharge by the High Court in its original criminal jurisdiction if bar to fresh proceedings—Criminal procedure Code* (Act V of 1898), s. 190 (c)—*Nolle prosequi—practice.* An order of discharge does not operate as a bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a police report, or under s. 190 (c) of the Criminal Procedure Code. *Mir Ahwad Hossein v. Mahomed Askari*, I. L. R. 29 Cal. 726, referred to. *EMPEROR v. SHERK IDOO* (1912), I. L. R. 40 Cal. ... 71

**Jury, trial by—Charge to the jury—Misdirection—Suggestion by the Judge of an alternative aspect of the case not put forward by the prosecution or defence—Omission to point out to the jury, specifically, the evidence against each accused and minute details—Criminal Procedure Code (Act V of 1898), ss. 297, 303—*Rioting—"Violence," meaning of—Penal Code* (Act XLV of 1860), ss. 146, 147—*Admissibility of evidence of a proceeding to keep the peace as part of the res geste.***

**Jury, trial by—*contd.***

Where the common object alleged in the charge as framed was to take forcible possession of the complainant's land and hut and to assault him and others named, and the prosecution and defence each asserted exclusive possession and an attack by the opposite party: *Held*, that the Judge was not wrong in asking the jury to consider as a third alternative, an intermediate state of facts, viz., that the complainant's party went to turn the accused party out of possession, was resisted and driven back, and that the latter then followed after and assaulted the former. *Banga Haldia v. King-Emperor*, 11 C. L. J. 270, *Queen v. Sabid Ali*, 20 W. R. Cr. 5, and *Wa'adar Khan v. Queen-Empress*, I. L. R. 21 Cal. 955, distinguished. The word "violence" in s. 146 of the Penal Code is not restricted to force used against persons only, but extends also to force against inanimate objects. The omission to point out to the jury, specifically, the exact evidence against each accused, is not a misdirection when the Judge has discussed the whole of it and has told them to be satisfied as to the guilt of, and to return an independent verdict against, each accused. *SAMARUDDI v. EMPEROR* (1912), I. L. R. 40 Cal. ... 367

*Verdict by casting lots—Admissibility of the evidence of jurors and of admissions by jurors as to the mode of arriving at the verdict—Evidence of other persons in proof of the same, admissibility of.* The sworn statements of jurors, and evidence of admissions by them as to the mode in which their verdict had been arrived at, are inadmissible. But the evidence of other persons as to the same is receivable. *Owen v. Warburton*, 1 B. & P. 326, *Straker v. Graham*, 4 M. & W. 721, *Burgess v. Langley*, 5 M. & G. 722, and *Queen v. Murphy*, L. R. 2 P. C. 535, referred to. The evidence of a witness that he saw one of the jurors put some pieces of crumpled up paper in his

PAGE.

**Jury, trial by—*contd.***

*alwan*, shake them up and take them out, is not sufficient to prove that the verdict was arrived at by casting lots. *EMPEROR v. HARKUMAR BARMAN ROY*, (1913) I. L. R. 40 Cal. ... 693

**Ketuba:** See JEWISH LAW ... 266

**Land Acquisition—Compensation—Appropriation of Compensation money—method of Assessment—Government as landlord, share of.** In assessing the amount of compensation due to the landlord, regard must be had to the question of how much the landlord is actually realising from the land. The Government, in its capacity as landlord, is entitled as usual to a capitalisation of as much rent as may be found to be payable in respect of the proportion of the holding that is taken, together with 15 per cent. for compulsory acquisition, and something more in respect of the possibility of the enhancement of the value of the land thereafter. The Government is not entitled in law to a higher proportion, on the ground that in similar cases it has frequently received a higher proportion either by consent of the parties or otherwise. *MANMOHAN DUTT v. COLLECTOR OF CHITTAGONG* (1912) I. L. R. 40 Cal. 64

**Land Acquisition Act (1 of 1894), s. 31, cl. (2):** See SHEBAIT ... 895

**proceedings under:** See APPEAL TO PRIVY COUNCIL ... 21

**Landlord and Tenant—Transfer of holding—Usufructuary mortgage of holding, effect of—Bengal Tenancy Act (VIII of 1885), s. 25—Abandonment—Forfeiture.** An unauthorized transfer of a holding or the parting with possession of it, in whole or in part, does not *per se* work a forfeiture under the Bengal Tenancy Act. Transfer by way of usufructuary mortgage stands on the same footing as other partial transfers. *Kabil Sardar v. Chandra Nath Nag Choudhry*, I. L. R. 20 Cal. 590, *Mathura Mandal v. Ganga Charan*

PAGE.

**Landlord and Tenant—concl'd.**

*Gope*, I. L. R. 33 Calc. 1219, referred to. *Barada Charan Dutt v. Hem Lata Dassi*, 13 C. W. N. 242, commented on. *Rasik Lal Datta v. Bidhumukhi Dasi*, I L. R. 33 Calc. 1094; *Rajendra Kishore Adhikari v. Chandra Nath Dutt*, 12 C. W. N. 878; *Krishna Chandra Datta Choudhury v. Khiran Bajania*, 10 C. W. N. 499, distinguished. BHUPENDRA NATH BOSE, *v. BANSI TANTI*, (1913) I. L. R. 40 Calc. ... 870

**'Landlord's Interest,'** meaning of—*Bengal Tenancy Act (VIII of 1885)*, s. 148, cl. (h). By the term "Landlord's interest" in s. 148, cl. (h) of the Bengal Tenancy Act, is meant the interest of the person entitled to receive the rent from the tenant at the date of the application for the execution of the decree. SHAMBHU NATH SINGH *v.* SIMEO PERSHAD SINGH (1913), I. L. R. 40 Calc. ... 462

**Lease, agreement to renew :** See SPECIFIC PERFORMANCE ... 565

**Legal Necessity :** See HINDU LAW - ALIENATION ... 721

**Legislation, ultra vires :** See JURISDICTION OF CIVIL COURT ... 391

**Legitimate Purpose :** See MORTGAGE ... 342

**Letters of Administration—Practice—**

*Colonial Probates Act (55 & 56 Vict., c. 6)*—*Power-of-attorney, construction of.* The Colonial Probates Act and the procedure therein indicated, viz., to send an exemplification of the probate granted in any part of the United Kingdom to be re-sealed by the Court to which it is sent, has not been extended to British India, where the practice is to require administration with will annexed to the estate of deceased British subject leaving property there. Authority in a power-of-attorney granted by the executrix of a will which has been confirmed in Scotland "to produce to the Supreme Court in India in the Probate jurisdiction at Calcutta or elsewhere in India the said confirmation and to procure the same to be

**Letters of Administration—concl'd.**

sealed with the seal of the Supreme Court in India in accordance with the laws thereof" does not authorise the donee to obtain grant of Letters of Administration. *In the goods of WILLIAM RENNIE* (1912), I. L. R. 40 Calc. ... 74

—*Revocation*  
—*Probate and Administration Act (V of 1881)*, s. 50, Expl (4)—"Just cause"—"Useless or inoperative," meaning of—*Disagreement between administrators, whether a just cause for annulling letters of administration.* A mere disagreement between administrators is not a "just cause" for annulling the letters of Administration under s. 50, expl. (4) of the Probate and Administration Act. The words "becomes useless and inoperative" in s. 50, expl. (4) of the Probate and Administration Act, imply the discovery of something which, if known at the date of the grant, would have been a ground for refusing it, e.g., the discovery of a later will or codicil, or subsequent discovery that the will was forged, or that the alleged testator is still living. *Bal Gangadhar Tilak v. Sakwarbai*, I. L. R. 26 Bom. 792, and *Ananda Prosad Chatterjee v. Kalikrishna Chatterjee*, I. L. R. 24 Calc. 95, followed. GOUR CHANDRA DAS *v.* SARAT SUNDARI DASSI (1912), I. L. R. 40 Calc. ... 50

**Letters Patent, 1865, cl. 12 :** See JURISDICTION ... 308

COURT. JURISDICTION OF ... 955

39: See APPEAL TO PRIVY COUNCIL ... 685

**Licensee, liability of :** See PETROLEUM ... 356

**Licenser and Licensee :** See TRADE-MARK ... 814

**Lieutenant-Governor, power of, to pass Act :** See JURISDICTION OF CIVIL COURT ... 391

**Life Assurance Companies Act (VI of 1912) :** See TRADE-NAME ... 570

**Limitation :** See ACCOUNT, SUIT FOR ... 108

— See HINDU LAW—ALIENATION 966

## PAGE.

**Limitation—contd.**

<b>Limitation : See SANCTION FOR PROSECUTION</b>	...	...	239, 584
<b>See TRANSFER</b>	...	...	259

**Limitation Act (IX of 1908)**  
*Sch. I. Arts. 19 and 23—Conspiracy to maliciously prosecute, suit for—Conspiracy as a cause of action—Evidence Act (I of 1872), ss. 3, 114 All.(g), 125—Standard of proof—Claim of privilege, whether adverse inference can be drawn from—disclosure of source of information by privileged person, duty of Court regarding—Presumption as to possession of article found in common room of joint family dwelling-house—Arrest and search—Professional conduct of Counsel—Counsel making charges of misconduct, powers of Court regarding—Counsel's instructions, no privilege as against Court—Professional etiquette affecting Counsel Bar Council, resolutions of—Counsel accepting retainer when likely to be witness—Counsel engaged in case, propriety of appearing as witness—Adverse inference where Counsel not called as witness—Inspection by Counsel of book produced by witness during cross examination—Reference to medical works by Court, without knowledge of parties—Tort. Per WOODROFFE AND COXE JJ. On the question of the standard of proof, there is but one rule of evidence which in India applies to both civil and criminal trials, and that is contained in the definition of "proved" and "disproved" in s. 3 of the Evidence Act. The test in each case is, would a prudent man after considering the matters before him (which vary with each case) deem the fact in issue proved or disproved? The Court can never be bound by any rule but that which, coming from itself, dictates a conscientious and prudent exercise of its judgment. There is a presumption against crime and misconduct, and the more heinous and improbable a crime is, the greater is the force of the evidence required to overcome such presumption. The English rule in these matters does not*

## PAGE.

**Limitation—contd.,**

as such, apply in India. *Jarat Kumari Dasi v. Bissessur Dutt*, I. L. R. 39 Calc. 245, explained. Where a document is privileged from production, no adverse inference can be drawn from its non-production. This rule applies as regards the party claiming privilege, and *a fortiori* it applies where the privilege is claimed by a third party. Although s. 125 of the Evidence Act does not in express terms prohibit a witness, if he be willing, from saying whence he got his information, the protection afforded by that section does not depend upon a claim of privilege being made, but it is the duty of the Court, apart from objection taken, to exclude such evidence. *A fortiori*, where privilege is claimed, no adverse inference can be drawn therefrom. Where articles are found in a part of a house to which several persons living in the house have access, such as a *boitakhana*, there is no presumption that they are in possession or control of any person other than the *karta* or head of the house. *Queen Empress v. Sangam Lall*, I. L. R. 15 All. 129, approved. *Semhle*: it is immaterial, in an action for malicious arrest, under what section of an Act an arrest is made, if in fact the circumstances are such that the Act justified arrest; and a person making a search is entitled to call in aid any statute which justifies his action, quite irrespective of whether it was present or not to his mind when he made the search. The Court is entitled to ask counsel who, during the conduct of a case makes charges of misconduct, whether he makes the charges on instructions, and if so, on whose. It is not sufficient to plead instructions. Counsel have a responsibility in the matter, and are not justified in making serious charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward. Instructions to counsel are only privileged in the sense of being



**Limitation—*contd.***

protected from disclosure to the opponent. There is no privilege as against the Court. The latter cannot use them as evidence in the case, and for the purpose of the trial would have to treat them as confidential but they could be called for then and there and be used after the trial for determining whether disciplinary action should be taken against counsel by the Full Court. Whenever a Court relies on a book of reference, such as a work on medical jurisprudence, it should be made known at the trial to the parties, so that they may have an opportunity of adducing evidence or argument on the point, *Durga Prasad Singh v. Ram Doyal Chaudhury*, 1 L. R. 38 Calc. 154, followed. The following resolutions of the Bar Council approved:—“(a) If Counsel knows or has reason to believe that he will be an important witness in a case, he ought not to accept a retainer therein. (b) If he accepts a retainer not knowing or having reason to believe that he will be such a witness, but at the opening or at any subsequent stage before evidence is concluded it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear in the case unless he cannot retire without jeopardising the interest of his client. (c) If counsel knows or has reason to believe that his own professional conduct on matters out of which the action arises is likely to be impugned in the case, he ought not to accept a retainer. (d) If he accepts a retainer not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned, but finds in the course of the case that it is so impugned, he ought to adopt the same course of conduct as is mentioned in clause (b) *ante*. (e) In either of the cases mentioned in clauses (b) and (d), there is no rule of professional ethics which debars counsel, if he continues to act as counsel in the case, from going

**Limitation—*continued.***

into the witness-box and being cross-examined.” Although the resolutions of the Bar Council are not binding on the Courts, the Bar Council is the recognised authority on matters of professional conduct and etiquette affecting counsel, and its opinion is of the greatest weight and value. There is nothing necessarily unprofessional in counsel giving evidence in a case in which he appears as such. *Sethna v. Mirza Mahomed Shirazi*, 9 Bom. L. R., 1044 *Cobbett v. Hudson*, 1 E. & B. 11. *Stones v. Byron*, 4 Dowl. & L. 393, *Deane v. Packwood*, 4 Dowl. & L. 395n, *Corea v. Peiris*, [1909] A. C. 549; 14 C. W. N. 86, *Nundo Lall Bose v. Nisturini Dass*, 1 L. R. 27 Calc. 428, referred to. *Curry v. Walter*, 1 Esp. 456, distinguished. As a general practice, however, it is undesirable when the matter to which counsel depose is other than formal, that they should testify either for or against the party whose case they are conducting. Under s. 118 of the Evidence Act, counsel, although they may be engaged in the case, are competent to testify whether the facts in respect of which they give their evidence occur before or after their retainer. *Cobbett v. Hudson*, 1 E. & B. 11, referred to. The rule laid down in s. 114 ill. (g) of the Evidence Act that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the party who withholds it, was held to apply to the case of counsel engaged in a suit who should not have been, under the circumstances, counsel but should have been called as a witness. It is unprofessional for counsel to cross-examine a witness as to facts within his personal knowledge. *In the matter of certain Counsel*, 4th August, 1908, (unreported), approved. Where counsel during the hearing of a case calls for the production of a book, which is produced and handed to him by his opponent with certain pages marked as those only to which he

	PAGE.
<b>Limitation—contd.</b>	
may may refer in respect of the subject-matter of his cross-examination, it is improper for counsel who calls for the book to inspect any of the other pages. If a suit on a tort is barred as against one person, the period of limitation cannot be extended, because it happens to be against three persons who are alleged to have committed the tort in conspiracy. The same set of facts cannot constitute separate causes of action, both for a tort, and for a conspiracy to cause damage. Where there is a joint tort, the proper action is on the tort, against the joint tort-feasors, and not on a cause of action to recover special damage by reason of a conspiracy to cause damage. A suit for damages for false imprisonment or malicious prosecution against joint tort-feasors, is governed by the one-year rule under Articles 19 and 23 of the Limitation Act. There are instances in which two or more persons can render themselves liable to civil proceedings by combining to injure the plaintiff, although, if one of them did the same act by himself and without any preconcert with others, he would escape liability. An action on such a conspiracy would lie in this country. In an action on conspiracy, special damage must be proved. <i>Per CHATTERJEE, J.</i> There is no authority for holding that a tort, when committed by several persons acting in concert, is different from the same tort committed by a single individual. The combination in such cases may be an element of aggravation in the assessment of damages, but does not suffice to make it a different tort. <i>Quinn v. Leatham</i> , [1901] A. C. 495, referred to. Conspiracy or wrongful combination is not a material element in the constitution of a wrong. <i>Giblan v. National Amalgamated Labourers' Union</i> , [1903] 2 K. B. 600, referred to. <i>D. WESTON AND OTHERS v. PEARY MOHAN DASS</i> (1912) I. L. R. 40 Calc. ...	898

	PAGE.
<b>Limitation—concl'd.</b>	
<i>Suit by an auction-purchaser to recover the purchase-money from a person who attached money, in deposit in Court, as representing the surplus sale-proceeds belonging to the judgment-debtor—Limitation Act (XV of 1877), Sch. II, Art. 120.</i> Limitation applicable to a suit brought by an auction-purchaser to recover a certain sum of money from one who had, after the sale and the deposit of money in Court, attached that sum in execution of his decree against the judgment-debtor, as representing the surplus sale-proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree-holder, is that provided by Art 120, Sch. II of the Limitation Act (XV of 1877). <i>Nilkanta v. Imam Sahib</i> , I. L. R. 16 Mad. 361, relied on. <i>Hanuman Kamat v. Hanuman Mandur</i> , I. L. R. 19 Calc. 123, and <i>Ram Kumar Shaha v. Ram Gaur Shaha</i> , I. L. R. 37 Calc. 67, distinguished. <i>AMRITA LAL BAGCHI v. JOGENDRA LAL CHOWDHURY</i> (1912), I. L. R. 40 Calc. ...	187
<b>Limitation Act (XV of 1877), Sch. II, Art. 120 :</b> See AUCTION-PURCHASER, SUIT BY	180
<b>(IX of 1908) Sch. I, Arts. 19,</b>	
<b>23 :</b> See LIMITATION ...	898
<b>Art 89 :</b>	
See ACCOUNT, SUIT FOR ...	108
<b>s. 2(s), Sch. I,</b>	
<b>Art. 144 :</b> See ADVERSE POSSESSION	173
<b>Sch. I, Art</b>	
<b>154 :</b> See SANCTION FOR PROSECUTION	239
<b>Magistrate, duties of :</b> See ATTACHMENT ...	105
<b>Magistrate, Jurisdiction of :</b> See DISPUTE CONCERNING LAND ...	982
<b>Mahomedan Family :</b> See MORTGAGE ...	378
<b>Mahomedan Law—Endowment—Creation of endowment—Wakf by dedication or user—Graveyard, land used as—Presumption of ancient origin of shrine and burial place—Panjab Land Revenue Act (XVII of 1887), s. 44—Entry of ownership in record-of-rights at settlement.</b> In this case the Judicial Committee (affirming the decision of	

	PAGE.		PAGE.
<b>Mahomedan Law—<i>conold.</i></b>		<b>Mesne profits—<i>Jurisdiction—Suit for recovery of possession with mesne profits—Mesne profits assessed in the execution proceedings—Amount assessed more than the pecuniary jurisdiction of the Court.</i></b>	
the Chief Court of the Panjab held, on the evidence, that the land in suit (known as the Mai Pak Daman graveyard) which had been used from time immemorial by the Mahomedan community of Multan for the purpose of burying their dead, formed part of a graveyard set apart for the Mahomedan community, and that by user, if not by dedication the land was <i>wakf</i> . In the record-of-rights of the last settlement an area of land, which comprised the land in suit, was entered as "in the possession of Mahomedans," and was described as <i>kabristan</i> or <i>ghair-mumkin kabristan</i> (graveyard or unculturable land forming portion of a graveyard); and in the ownership column the name of the defendant (now represented by the Court of Wards) was entered as owner. Their Lordships said: "It would seem that he was properly entered as owner, being trustee and custodian of the shrine of the saint Mai Pak Daman, and being or claiming to be the recognised head of the Mahomedan community in Multan;" and held, that, under section 41 of the Panjab Land Revenue Act (XVII of 1887) the entry not having been disproved, must be presumed to be correct.		A suit for recovery of possession of certain lands with mesne profits from the date of dispossession up to the date of restoration of possession was brought in the Munsiff's Court. It was decreed together with the mesne profits claimed, and the Court directed that the amount of mesne profits would be determined in the execution proceedings. The decree having been affirmed on appeal, the decree-holder applied to the executing Court for ascertainment of mesne profits. The total amount of mesne profits ascertained by the Munsiff was Rs 1,630-8, including interest. On an objection taken by the judgment-debtor that the executing Court being a Munsiff, was not entitled to award mesne profits of a higher amount than Rs. 1,000; Held, that the executing Court had jurisdiction to award the mesne profits ascertained in the present case: <i>Rameswar Mahton v. Dihu Mahton</i> , I. L. R., 21 Calc. 550, followed in principle. <i>Bhupendra Kumar Chakrabarti v. Purna Chandra Bose</i> , 13 C. L. J., 132, distinguished.	
COURT OF WARDS <i>v.</i> ILAHI BAKHSH, (1912), I. L. R. 40 Calc. ...	297	PANCHURAM TEKADAR <i>v.</i> KINOO HALDAR (1912), I. L. R. 40 Calc. ...	56
<b>Maintenance Grant: See EXECUTION OF DECREE</b> ... ..	623	<b>Migration; See HINDU LAW—JOINT FAMILY</b> ...	407
<b>Mandamus: See PLEADERSHIP EXAMINATION</b> ... ..	588	<b>Minor, authority of; See MORTGAGE</b> ...	342
<b>Mandamus, action for: See MUNICIPAL CORPORATION</b> ... ..	836	— non-representation of: <i>See APPEAL TO PRIVY COUNCIL</i> ... ..	633
<b>Marriage Custom: See JEWISH LAW</b> ...	266	<b>Minority: See HINDU LAW—ALIENATION</b> ...	966
<b>Medical Works, reference to: See LIMITATION</b> ... ..	898	<b>Misdirection: See JURY, TRIAL BY</b> ...	367
<b>Memorandum of Appeal: See REFUND OF COURT-FEE</b> ... ..	365	<b>Misjoinder of Charges: See CHARGE</b> 318, 846	
— of Association: <i>See COMPANIES ACT, 1882, ss. 6, 40, 41</i> ...	1	<b>Misrepresentation: See ADVERSE POSSESSION</b> ... ..	173
<b>Merchandise Marks Act (IV of 1889) ss. 6, 7; See TRADE-MARK</b> ... ..	281	<b>Mitakshara: See HINDU LAW—JOINT FAMILY</b> ... ..	407
		<b>Money paid under Decree, suit for: See VOLUNTARY PAYMENT</b> ... ..	598
		<b>Mortgage: See AGREEMENT AGAINST PUBLIC POLICY</b> ... ..	113

	PAGE.
<b>Mortgage—contd</b>	
— See CENTRAL PROVINCIAL GOVERNMENT WARDS ACT, s. 18	... 784
— <b>by Widow:</b> See HINDU LAW—	
ALIENATION	... 721
— <i>Entire interest mortgaged for family purposes—Liability of minor son when authority may be presumed—Alienation—Onus of proof—Evidence Act (I of 1872), s. 106—Transfer of Property Act (IV of 1882) ss. 85, 90—Civil Procedure Code (V of 1908) O. XXXIV, r. 6.</i> Where a mortgage purports to charge the entire interest in a property, and the mortgage-money was advanced for legitimate family purposes, express or implied authority of minor co-parceners may be implied, and the mortgage may be enforced against the entire family interest. <i>Suraj Bansi Koer v. Sheo Persad Singh</i> , I. L. R. 5 Calc. 148, L. R. 6 I. A. 88, referred to. Authority to mortgage may also, according to the peculiar circumstances of a case, be implied even in cases where the mortgage-money was not advanced for legitimate family purposes. A mortgage is an alienation, even though it is for a very particular purpose, e.g., as security only for the amounts drawn or paid on account of instalments of rent. <i>Gharibullah v. Khalak Singh</i> , I. L. R. 25 All. 407, L. R. 30 I. A., 165, referred to. Where on the one side it is proved that the whole of the mortgage-money, with the exception of a very small portion of it, was advanced for legitimate family purpose, and there is, therefore, a sufficient foundation for a decree for sale on the mortgage, and on the other side it is not shown that the small portion of the debt was not for any immoral purpose, the smaller item may be regarded as a debt of the father binding on the son. <i>Hunoomanpersaud Panday v. Munraj Kooncerce</i> , 6 Moo. I. A. 393, 18 W. R., 81 n, <i>Luchmun Dass v. Giridhar Chowdhry</i> , I. L. R. 5 Calc. 855, <i>Maheswar Dutt Tewari v. Kishun Singh</i> , I. L. R. 34 Calc. 184, <i>Kishun Persad Chowdhry v. Tipan</i>	

	PAGE
<b>Mortgage—concluded.</b>	
<i>Pershad Singh</i> , I. L. R. 34 Calc. 735, <i>Lala Suraj Prosad v. Golab Chand</i> , I. L. R. 28 Calc. 517, referred to. <i>BISWANATH PERSAD MAHTA v. JAGDIP NARAIN SINGH</i> (1912) I. L. R. 40 Calc. 342	
— <i>Mortgage bond executed by male members of Mahomedan family—No proof of custom to exclude females as in Hindu family—Female members added as defendants in mortgage suit, though not executants of bonds—Form of decree—Whether females were represented in the mortgage transaction by male members of family—Estoppel by conduct.</i> The appellants were the female members of a Mahomedan family which had adopted the Hindu religion in matters of worship, and as to which both Courts in India concurrently held that there was no custom proved excluding female members from inheritance, which was the case set up by the respondent. In a suit brought by the latter to enforce a mortgage bond which had been executed only by the male members of the family, in which suit the appellants were also joined as defendants, the first Court made a decree against the interests of the male defendants only in the property; but the High Court decreed the suit against both the male and female defendants on the ground that, because the female members had not actively interfered in the management of the property, the male defendants must betake to have represented them in the mortgage transaction. It appeared that in other transactions the male members of the family had dealt with the family property without the active concurrence of the females: <i>Held</i> by the Judicial Committee, reversing the decision of the High Court, that the evidence did not prove that the male defendants had “represented” the appellants. The latter were <i>purdanashin</i> ladies, and naturally left the management of the property to their male relatives. There was nothing to show that the appellants had misled the respondent either by word or conduct to the belief that	

**Mortgage—concl'd.**

they had no proprietary interest in the property; and he made no inquiries in the matter from them or their husbands as he might have done if he had any doubt in the matter. The decree of the High Court was therefore erroneous so far as it made the appellants liable, and should have been limited to making liable only the interests in the property of the male defendants, the executors of the mortgage bond. *AZIMA BIBI v. SHAMALANAND* (1912) I. L. R. 40 Cal. 378

—*Sale—Chota Nagpur Tenancy Act (Beng. VI of 1908), s. 47—Decree for sale of property situate in Manbhūm—Estoppel.* After the preliminary decree on a mortgage was passed and before the final decree for sale was made, the Chota Nagpur Tenancy Act 1908, was extended to Manbhūm where the mortgaged property was situate. The judgment-debtor having objected to the application of the decree-holder for sale of the said property, both Courts set aside the objection, and the sale to the decree-holder was thereafter confirmed. Upon appeal to the High Court: *Held*, that the sale was in direct contravention of the provisions of s. 47 of the Chota Nagpur Tenancy Act. *Held*, further, that the judgment-debtor cannot be estopped from bringing to the notice of the Court what the Court must be taken to know of itself, that there was a distinct provision of law which prevented the sale of the property. *LAKSHMI BIBI KURANI v. ATAL BIHARI HALDAR* (1913), I. L. R. 40 Cal. ... 534

—*DECREE: See DAMDUPAT, RULE OF* ... 710

—*: See EXECUTION OF DECREE* ... 704

**Mortgagee, purchase by:** *See SALE FOR ARREARS OF REVENUE* ... 89

**Municipal Corporation—Chairman—General Committee—Building plans, refusal of sanction of—Calcutta Municipal Act (Beng. III of 1899), ss. 375, 377—Action for mandamus or damages**

**Municipal Corporation—concl'd.**

*whether maintainable—Specific Relief Act (I of 1877), s. 45.* Where plans for building have been rejected by the Chairman and the General Committee of the Calcutta Municipal Corporation, no suit is maintainable to have the plans approved or for damages. If the Chairman and General Committee have acted honestly and within their authority, their decision cannot be reviewed by any Court. If the plans have been rejected *malā fide* the only remedy is by an application under s. 45 of the Specific Relief Act, for an order to compel the Chairman and the General Committee to hear the matter in the manner provided by law. *Davis v. Bromley Corporation*, [1908] 1 K. B. 170. and *Smith v. Chorley Rural Council*, [1897] 1 Q. B. 678, followed. *London and North Western Railway v Westminster Corporation*, [1904] 1 Ch. 759, referred to. *PROSAD CHUNDER DE v. CORPORATION OF CALCUTTA* (1913) I. L. R., 40 Cal. 836

**Necessity:** *See HINDU LAW—ALIENATION* 288

**Negligence:** *See CARRIERS* ... 716

**Nolle prosequi:** *See JURISDICTION OF CRIMINAL COURT—FRESH PROCEEDINGS* 71

**Non-occupancy Raiyats:** *See EJECTMENT* ... 858

**Notice:** *See PROCESSION* ... 470

—*Secretary of State for India in Council, suit against—Notice by two out of sixty-three joint owners of land—Sufficiency of notice—Waiver—Estoppel—Objection taken at a late stage, if permissible—Civil Procedure Code (Act V of 1908), s. 80.* Under s. 80 of the Code of Civil Procedure it is essential that the notice should state the names, descriptions and places of residence of all the plaintiffs. Where a suit was brought by sixty-three plaintiffs against the Secretary of State for India in Council and others, and the notice of the suit contained the names, descriptions and places of residence of two out of the sixty-three plaintiffs: *Held*, that such a notice was insufficient and did not fulfil the requirements of the statute.

PAGE.

PAGE.

**Notice—conold.**

*The Secretary of State for India v. Perumal Pillai*, I. L. R., 24 Mad. 279, and *Manindra Chandra Nandi v. The Secretary of State for India*, 5 C. L. J. 148, referred to. It is competent to the Secretary of State to waive the notice, and he may be estopped by his conduct from pleading the want of notice at a late stage of the case: *Manindra Chandra Nandi v. The Secretary of State for India*, 5 C. L. J. 148, referred to. Where the written statement contained an objection as to the validity of the notice, but no objection was taken by the Secretary of State at any stage of the trial to its omission and it was the second defendant who prayed, just before the trial began, that an additional issue might be raised on this question: *Held*, that it was not competent to the second defendant to raise this question. *BHOLA NATH ROY v. SECRETARY OF STATE FOR INDIA* (1912), I. L. R. 40 Cal., ... 503

**Notice of Execution:** See EXECUTION OF DECREE ... 45

**Official Assignee, duties and rights of:** See SALE OF GOODS ... 523

— title of; See INSOLVENCY ... 78

**Omission:** See CHARGE ... 168

— to serve notice, effect of: See EXECUTION OF DECREE ... 45

**Onus of Proof:** See CARRIERS ... 716

**Ostensible Means of Subsistence—Conducting the play of “ring” game—Criminal Procedure Code (Act V of 1898), s. 109.** The conducting of the “ring” game is an ostensible means of subsistence within the meaning of s. 109 of the Criminal Procedure Code. *Hari Sing v. King-Emperor*, 6 C. L. J. 708, referred to. *BANGALI SHAH v. EMPEROR*, (1913) I. L. R. 40 Cal., 702

**Ownership, entry of in record-of-rights:** See MAHOMEDAN LAW, ENDOWMENT ... 297

**Panjab Land Revenue Act (XVII of 1887), s. 44:** See MAHOMEDAN LAW—ENDOWMENT ... 297

**Partial Decree:** See REFUND OF COURT-FEE 365

**Parties—RELIGIOUS ENDOWMENT—Suit against the sole surviving member of the committee and the Superintendent of a temple—Death of the sole surviving member—Substitution of the adopted son—New committee added as party—Cause of action, abatement of—Civil Procedure Code (Act V of 1908), O. XLI, r. 20; O. XXII, r. 10; O. I, r. 10. Religious Endowments Act (XX of 1863), s. 14.** A suit brought against the sole surviving members of the committee of management appointed under section 3 of the Religious Endowments Act, 1863, and against the superintendent of a temple, for their removal from the committee and from the office of superintendent, respectively, was dismissed by the District Judge. Pending the appeal, the 1st defendant died, and his adopted son was brought on the record as a party by the plaintiffs. Subsequently, a new committee was appointed and added also as a party, and the appeal was proceeded with against the adopted son, the superintendent and the new committee: *Held*, that the relief against the 1st defendant was purely personal and that the cause of action did not survive against his adopted son: *Held*, also, that the members of the new committee should not have been added as parties respondents. *Kashi v. Sadasiv Sukharam Shet*, I. L. R. 21 Bom. 229, referred to. *Held*, further, that the suit could not be maintained as against the 2nd defendant alone, and that the appeal, as now constituted, was incompetent.

*BHIMA ROUT v. DASARATHI DASS*, (1912) I. L. R. 40 Cal., ... 323

**Partition, suit for:** See HINDU LAW—ALIENATION ... 966

**Partner, liability of:** See TRADE-MARK ... 814

**Penal Code (Act XLV of 1860), ss. 146, 147:** See JURY, TRIAL BY ... 367

—, s. 147: See ATTACHMENT ... 849

		PAGE.
<b>Penal Code (Act XLV of 1860)—<i>conold.</i></b>		
	<b>ss. 147, 323:</b>	
<i>See</i> CUMULATIVE SENTENCES	...	511
	<b>ss. 193, 471:</b>	
<i>See</i> SANCTION FOR PROSECUTION	...	584
	<b>s. 211: <i>See</i></b>	
COMPLAINT, DISMISSAL OF	...	441
	<b>s. 211: <i>See</i></b>	
JURISDICTION OF CRIMINAL COURT	...	36
	<b>s. 297: <i>See</i></b>	
GRAVE-YARD	...	548
	<b>ss. 408 477A:</b>	
<i>See</i> CHARGE	...	318
	<b>s. 411: <i>See</i></b>	
DISHONESTLY RECEIVING STOLEN PROPERTY ...	...	990
	<b>ss. 482, 485,</b>	
<b>486: <i>See</i> TRADE-MARK</b>	...	281
	<b>s. 499: <i>See</i></b>	
DEFAMATION	...	433
<b>Perpetuities: <i>See</i> WILL</b>	...	192
<b>Petroleum—</b> <i>Keeping in possession a quantity exceeding the maximum allowed by Law—Liability of a licensee for the acts of his servant or agent in the absence of finding of guilty knowledge on his own part—</i> <b>Petroleum (Act VIII of 1899), ss. 11 and 15 (a).</b> A licensee is not, in the absence of a finding by the Court that he knew that more than 500 gallons of petroleum were being transported at one time on his license, and that he allowed the same to take place with such knowledge by his servant, criminally liable, under ss. 11 and 15(a) of the Indian Petroleum Act (VIII of 1899), for the acts of the latter done in contravention of the law. Though the Act provides a personal penalty, the only person that can be punished is the one who keeps petroleum, or carries it about, or puts more than 500 gallons at one place.		
GANPAT RAI <i>v.</i> EMPEROR (1912), I. L. R. 40 Cal.	...	356
<b>Petroleum Act (VIII of 1899), ss. 11, 15 (a)</b>		
<i>See</i> PETROLEUM	...	356
<b>Plaint, rejection of <i>See</i> COURT-FEE</b>		
	...	615

	PAGE.
<b>Plea of Limitation taken on Remand: See</b>	
ACCOUNT, SUIT FOR ...	108
<b>Pleadership Examination—Candidate—</b>	
<i>Examiners—Specific Relief Act</i>	
<i>(I of 1877), ss. 45 and 46—Mandamus—Discretion.</i>	
In making an application under s. 45 of the Specific Relief Act the provisions of s. 46 must be strictly observed, and in dealing with such an application the principles applicable to a writ of <i>mandamus</i> should generally be followed. <i>Bank of Bombay v. Suleman Somji</i> , I. L. R. 32 Bom. 466, referred to.	
PROVAS CHANDRA ROY, <i>In the matter of</i> , (1913) I. L. R. 40 Cal	588
<b>Police Act (V of 1861 as amended by Act VIII of 1895), s. 15, cl. (4): See</b>	
PUNITIVE POLICE ...	452
<b>Police Regulation: See</b>	PROCESSION ... 470
<b>Police Report: See</b>	COGNIZANCE ... 854
<b>Possession: See</b>	PETROLEUM ... 356
— <b>suit for</b>	See MESNE PROFITS ... 56
<b>Power of Attorney, construction of: See</b>	
LETTERS OF ADMINISTRATION ...	74
<b>Practice: See</b>	ASSESSORS, EXAMINATION OF ... 163
— <b>See</b>	ATTACHMENT ... 105
— <b>See</b>	ATTORNEY AND CLIENT ... 386
— <b>See</b>	CHARGE ... 168
— <b>See</b>	COGNIZANCE ... 854
— <b>See</b>	COMPLAINT, DISMISSAL OF ... 407
— <b>See</b>	CRIMINAL REVISION ... 41
— <b>See</b>	JURISDICTION OF CRIMINAL COURT—FRESH PROCEEDINGS ... 71
— <b>See</b>	LETTERS OF ADMINISTRATION ... 74
— <b>See</b>	REFUND OF COURT-FEE ... 365
— <b>See</b>	SANCTION FOR PROSECUTION... 423
— <b>See</b>	TRANSFER OF APPEAL ... 259
— <b>Appellate Court, duty of—</b>	
<i>Defective judgment—omission to consider the defence evidence in a bad livelihood case—Criminal Procedure Code (Act V of 1898), ss. 110, 118, 367 and 424. It is the duty of the Appellate Court, on an appeal from an order under ss. 110 and 118 of the</i>	

	PAGE.		PAGE.
<b>Practice—concl'd.</b>		<b>Principal and Agent—concl'd.</b>	
Criminal Procedure Code, to look into the evidence for the defence, and after dealing with it to come to a decision thereon, notwithstanding that the counsel for the appellant has practically ignored it during his arguments.		been commenced by his agent. <i>Sadler v. Leigh</i> , 4 Camp. 195, approved.	
<i>FIDDI HOSSEIN V. EMPEROR</i> (1912), I. L. R. 40 Calc. ...	376	<i>GODHANRAM V. JAHARMULL PUGLIA</i> (1912), I. L. R. 40 Calc. ...	335
<b>—Evidence—Defendant's right to offer evidence.</b> Where the defendant appears and the plaintiff does not appear or offers no evidence when a suit is called on for hearing, the Court has no jurisdiction except to dismiss the suit for want of prosecution: the defendant is not entitled to have his evidence heard before the suit is dismissed. <i>Ex parte Jacobson</i> , L. R. 22 Ch. D. 312, distinguished.		<b>Privilege.</b> See DEFAMATION—STATEMENT BY ACCUSED ...	433
<i>KESRI CHAND V. NATIONAL JUTE MILLS CO.</i> , (1912) I. L. R. 40 Calc. ...	119	<b>—See LIMITATION</b> ...	898
<b>Preliminary Inquiry:</b> See COMPLAINT, DISMISSAL OF ...	444	<b>Privilege of Counsel:</b> See LIMITATION ...	898
<b>Presidency Towns Insolvency Act (III of 1909), ss. 17, 126.</b> See INSOLVENCY ...	78	<b>Privy Council, Practice of:</b> See ADOPTION ...	879
<b>— ss. 52, 62, 64:</b> See SALE OF GOODS ...	523	<b>Probate:</b> See HINDU LAW—STRIDHAN ...	82
<b>Principal and Agent:</b> See ACCOUNT, SUIT FOR	108	<b>Probate and Administration Act (V of 1881), s. 50, EXPL. (4)</b> See LETTERS OF ADMINISTRATION ...	50
<b>—Suit for declaration of title to the benefits of a decree—Maintainability of the suit.</b> Where an agent entered into a contract in his own name with a third party and brought a suit to recover damages for breach of the same and obtained a decree thereon, a suit, subsequently brought by the principal against the agent for declaration of title to the decree, was not maintainable. The principal, before the suit was brought by his agent, might have adopted the contract made by the letter, and sued on it; but if he did so, he was bound to adopt the contract <i>cum onere</i> . <i>Udell v. Atherton</i> , 7 H. & N. 172, and <i>Bristow v. Whitmore</i> , 9 H. L. C. 391, approved. He might also have intervened at any stage in the action which had		<b>Procession—Commissioner of Police—Orders prohibiting a public procession and a particular individual from joining it—Legality of such orders—Public notice of order, necessity of—Power of Indian Legislature to make police regulations regarding public processions—Calcutta Police Act (Beng. IV of 1866), ss. 62A (4), 102 A—Calcutta Suburban Police Act (Beng. II of 1866), ss. 39A (4), 49A—Calcutta and Suburban Police (Amendment) Act (Beng. III of 1910) ss. 16 and 31. Sub-section (4) of s. 62A of the Calcutta Police Act and of s. 39A of the Suburban Police Act must be strictly construed. It empowers the Commissioner of Police when he considers it necessary to do so for the preservation of the public peace or public safety, to prohibit a procession or public assembly but not a particular individual from taking part in the same. The sub-section does not require any public notice of an order passed thereunder to be given within the meaning of ss. 102A of the Calcutta and 49A of the Suburban Police Acts. <i>Semble:</i> Indian Legislature is competent to make police regulations of the kind in the interests of public peace and safety.</b>	
		<i>LEAKAT HOSSEIN V. EMPEROR</i> (1913), I. L. R. 40 Calc. ...	470



	PAGE.
<b>Proclamation of Sale, irregularities in:</b> <i>See</i>	
APPEAL TO PRIVY COUNCIL ...	635
<b>Professional Conduct of Counsel:</b> <i>See</i>	
LIMITATION ...	898
<b>Professional Etiquette:</b> <i>See</i> COUNSEL,	
PROFESSIONAL CONDUCT OF ...	898
<b>Proof, standard of:</b> <i>See</i> LIMITATION ...	898
<b>Prosecution:</b> <i>See</i> COLLECTOR ...	465
<b>Prosecution, order for:</b> <i>See</i> JURISDICTION OF	
CRIMINAL COURT ...	360
<b>Prostitute's Property:</b> <i>See</i> HINDU LAW—	
STRIDHAN ...	650
<b>Provident Insurance Societies Act (V of 1912)</b>	
ss. 5, 6: <i>See</i> TRADE-NAME ...	570
<b>Provident Insurance Society:</b> <i>See</i> TRADE-	
NAME ...	570
<b>Provincial Insolvency Act (III of 1907), ss.</b>	
2 (1) (g), 18, 20 (c), 40 (1), 44, 47: <i>See</i>	
RECEIVER ...	678
ss.	
48, 47: <i>See</i> APPEAL TO PRIVY COUNCIL	685
s.	
50: <i>See</i> INSOLVENCY ...	78
<b>Public Policy:</b> <i>See</i> TRADE-MARK ...	814
<b>Punitive Police—Costs, apportionment of—</b>	
<i>Police Act (V of 1861 as amended</i>	
<i>by Act VIII of 1895), ss. 15 cl. (4),</i>	
<i>16—District Magistrate, duty of—</i>	
<i>Amount realized on apportionment</i>	
<i>made by a Deputy Magistrate, effect</i>	
<i>of—Secretary of State for India,</i>	
<i>suit against, if maintainable.</i> An	
apportionment of costs made by a	
Deputy Magistrate, under s. 15, cl. (4)	
of the Police Act, for maintenance	
of a police force, is illegal. Where,	
therefore, an apportionment of costs	
having been made by a Deputy	
Magistrate, and which on appeal	
having been affirmed by the District	
Magistrate, the amount of costs	
assessed was recovered from a person,	
under s. 16 of the Act, by distress	
warrant: <i>Held</i> , that the amount not	
being legally realized, a suit for the	
recovery thereof would lie against	
the Secretary of State for India in	
Council: <i>Sivabhajan v. The Secretary</i>	
<i>of State for India</i> , I. L. R. 28 Bom.	
314, referred to.	
KAILASH CHANDRA NAG v. SECRETARY	
OF STATE FOR INDIA (1912),	
I. L. R. 40 Calc. ...	452

	PAGE.
<b>Punitive Police—concl'd.</b>	
<b>Purchaser, liability of:</b> <i>See</i> SALE FOR	
ARREARS OF REVENUE ...	89
<b>Purchaser, rights of:</b> <i>See</i> SALE FOR	
ARREARS OF REVENUE ...	89
<b>Purdanashin Ladies, liability of:</b> <i>See</i>	
MORTGAGE ...	378
<b>Railway Receipt, production of:</b> <i>See</i>	
DISHONESTLY RECEIVING STOLEN	
PROPERTY ...	990
<b>Rateable Distribution—Deposit by Judg-</b>	
<i>ment-debtor—Civil Procedure Code</i>	
<i>(Act V of 1908), O. XXI, r. 89, and</i>	
<i>s. 73—Alteration in s. 73, effect of.</i>	
When money is paid into Court	
under O. XXI, r. 89 of the Civil	
Procedure Code, 1908, there can be	
no rateable distribution under s. 73	
of the Code. The scope of s. 73 of	
the new Code of Civil Procedure	
(Act V of 1908) is far wider than	
that of s. 295 of the old Code (Act	
XIV of 1882), yet the effect of the	
enactment in s. 310A of the old Code,	
which is reproduced in O. XXI, r. 89	
of the new Code, remains unaltered.	
HARAI SABA v FAIZLUR RAHMAN,	
(1913) I. L. R. 40 Calc. ...	619
<b>Receiver—Insolvency—atri or "Pilgrim-</b>	
<i>business", profits from—Priest, office</i>	
<i>of—Provincial Insolvency Act (III</i>	
<i>of 1907), ss. 2(1) (g), 18, 20 (c), 40</i>	
<i>(1), 44, 47—"Business"—"Trade."</i>	
Where, pending an appeal to the High	
Court by a creditor in insolvency	
against a conditional order of dis-	
charge in favour of the insolvent who	
was a <i>panda</i> or priest attached to the	
temple of Jagannath at Puri, an	
application was made for the appoint-	
ment of a receiver in respect of the	
business of the insolvent, which	
consisted in receiving pilgrims, hous-	
ing them, feeding them looking after	
their comfort, and accompanying	
them to the temple of Jagannath, in	
return for a fee from the said pilgrims	
in the nature of a voluntary payment,	
object of the creditor being not to stop	

PAGE.

PAGE.

**Receiver—concl'd.**

the business but to carry it on, so that the insolvent priest may be constantly attended by the receiver, who may take possession of all his earnings: *Held*, that what the priest did for the pilgrims could not appropriately be described as "business" within the meaning of clause (c) of s. 20 of the Provincial Insolvency Act; and that the exercise of his calling by the insolvent, under the circumstances stated, could not be deemed a "trade" within the meaning of sub-s. (1) of s. 40 of the Provincial Insolvency Act. *Held*, also, that ordinarily the business of the insolvent might be carried on by the receiver not with a view to profit, but only in so far as might be necessary for the beneficial winding up of the same. *Ex parte Emmanuel*, 17 Ch. D. 35, followed. The difference between a receiver and a manager explained. *In re Manchester and Milford Railway Co.*, 14 Ch. D. 645, *Moss Steamship Co. v. Whitney*, [1912] A. C. 254. *In re Leas Hotel*, [1902] 1 Ch. 332, *Boehm v. Goodall*, [1911] 1 Ch. 155, and *In re Newdigate Colliery, Ltd.*, [1912] 1 Ch. 468, referred to.

ANAND MAHANTI *v.* GANESH MAHESHWAR (1913) I. L. R. 40 Calc. 678

**Receiver, appointment of—Civil Procedure Code (Act V of 1908), O. XL, r. 1—Powers of Civil Court when Receiver in possession under s. 146 (2), Criminal Procedure Code (Act V of 1898)—Conditional appointment—Former Receiver, reappointment of.** The appointment of a receiver by a Civil Court under O. XL, r. 1 of the Code of Civil Procedure does not operate as a discharge of the receiver of the same properties already appointed by a Magistrate under section 146 (2) of the Code of Criminal Procedure. As a general rule when there is a receiver in possession appointed by the Magistrate, an application is made to the Civil Court to exercise its powers under O. XL, r. 1 of the Code of Civil Procedure, the Civil Court should make a conditional order

**Receiver, appointment of—concl'd.**

of appointment and inform the Magistrate so that the latter may have an opportunity of withdrawing his attachment. Unless there is good reason to the contrary, the Civil Court should, as a matter of judicial discretion, appoint as its receiver the person already appointed by the Magistrate. *Barkat-un-nissa v. Abdul Aziz*, I. L. R. 22 All. 214, distinguished.

BIDYAPRASAD NARAIN SINGH *v.* ASHRAFI SINGH, I. L. R. 40 Calc. ... 862

**Receiver pendente lite:** *See* RELIGIOUS TRUST ... 251

**Reference by Collector of Rangoon:** *See* APPEAL TO PRIVY COUNCIL ... 21

**Refund of Court-fee—Appeal, over-valuation of—Partial decree—Memorandum of appeal, over-valuation of—Court-fee paid in excess by inadvertence—Practice.** The appellant's agent having, by inadvertence, overpaid court-fee on the memorandum of appeal, the High Court directed the Taxing officer to issue the necessary certificate to enable the appellant to obtain a refund of the excess court-fee from the Revenue authorities. *In the matter of Grant*, 14 W. R. 47, referred to.

HARIHAR GURU *v.* ANANDA MAHANTY (1912), I. L. R. 40 Calc. ... 365

**Refusal to grant time:** *See* ATTACHMENT ... 105

**Regulation VIII of 1793, ss. 54, 55:** *See* ABWAB ... 806

**Regulation IX of 1833, ss. 20, 21:** *See* COLLECTOR ... 465

**Relationship, evidence of:** *See* HINDU WIDOW ... 555

**Religious Endowment:** *See* PARTIES ... 323

**Religious Endowments Act (XX of 1883), s. 14:** *See* PARTIES ... 323

**Religious Trust:** *See* Trust ... 232

**Religious Trust—Deed of endowment—Sole shebait—Appointment of new shebait in case of death—Appointment how to be made—Receiver pendente lite.** Trust will not be allowed to fail for want of a trustee, and,

**Religious Trust—conold.**

consequently, if the nominee dies before qualifying or afterwards, the Court will appoint a trustee. *In re Orde*, 24 Ch. D. 271, *Re Ambler's Trust*, 59 L. T. N. S. 210, *Gunson v. Simpson* L. R. 5 Eq. 332, *In re Smirthwaite's Trusts*, L. R. 11 Eq. 251, referred to. Where a *shebait* is dead and there is no provision in the deed of endowment about the mode in which the office is to be filled up, the Court will not read into the deed of endowment a provision for appointment to the office of *shebait* which is not to be found therein. It becomes incumbent upon the representatives of the founders to make an appointment to the office of *shebait*, and upon failure to do so the Court has power to appoint a new trustee, and will exercise this power wherever there is a failure of a suitable person to perform the trust either from original or supervenient disability to act. *Sital Dass Bahaji v. Pratap Chandra Sarmā*, 11 C. L. J. 2, referred to. The appointment of a fit and proper person to be a new trustee is not a matter of arbitrary discretion of the Court. The appointment must be made subject to well-known and defined rules. *In re Tempest*, L. R. 1 Ch. App. 485, referred to. Where a receiver appointed *pendente lite* was directed by the Subordinate Judge to continue to manage the properties on the scheme laid down in the deed of endowment, pending an agreement between the parties to appoint a *shebait*: *Held*, that the proper course to follow was, either to dismiss the suit, or, if the parties so desired, to appoint a *shebait* and place the properties in his hands. This latter order could be properly made only after amendment of the prayer in the plaint.

RAJKRISHNA DEY v. BIPIN BEHARI DEY (1912), I. L. R. 40 Cal. ... 251

**Removal of Caste Disabilities Act (XXI of 1850):** See HINDU LAW—JOINT FAMILY ... 407

PAGE.

PAGE.

**Rent, suit for:** See JURISDICTION OF CIVIL COURT ... 402

**Rent Decree:** See EXECUTION OF DECREE ... 623

**Rent Recovery Act (Beng. VIII of 1855), ss. 4, 5, 16:** See EXECUTION DECREE ... 623

**Representative in Interest:** See EVIDENCE ... 891

**Re-publication:** See WILL ... 192

**Resjudicata:** See COMPANIES ACT, 1882, ss. 6, 40, 41 ... 1

—————See ENHANCEMENT OF RENT ... 29

—————See REVIEW, APPLICATION FOR ... 541

**Retrial:** See ASSESSORS, EXAMINATION OF ... 143

**Revenue Commissioner:** See COMMISSIONER, POWER OF ... 552

**Revenue Court:** See JURISDICTION OF CIVIL COURT ... 402

**Revenue Sale Law (Act XI of 1859), s. 25:** See COMMISSIONER ... 552

**Reversioner:** See HINDU LAW—ALIENATION 721

**Review:** See COMMISSIONER, POWER OF ... 552

**Review—Vendor and purchaser—Conditions of sale, effect of—Title—Commissioner of Partition, sale by, not sale by Court—Rules and Orders of the High Court, r. 426, scope of.** Under an order of Court that he “be at liberty to sell” a Commissioner of Partition sold certain property by public auction. The conditions of sale, *inter alia*, stipulated that “there were no documents of title, except those mentioned in the abstract of title, that the purchaser should not be entitled to call for any other document, or to object to the title on the ground on the non-production thereof, and that no objection to the title should be allowed.” The purchasers at the auction subsequently obtained an order of Court directing the Registrar to enquire and report under rule 426 as to the vendor’s title. On an application for review of judgment: *Held*, that the review must be granted on the ground that the sale was not a sale by the Court. *Golan Dossain Cassim Ariff v. Fatima Begum*, 16 C. W. N. 394, and *Chandranath Biscas v. Bismarath Biswas*, 6 B. L. R. 492n, followed.

## PAGE

## PAGE.

**Review—concl'd.**

The conditions of sale did not preclude the purchasers from raising the questions of the vendor's title where it appeared (i) that the abstract of title commenced with a bond of indemnity which was in no sense a root of title, and (ii) that the abstract did not expressly disclose the nature of the title, or indicate that the property was subject to a permanent lease at a small rent.

JOGEMAYA DASEE v. AKHOY COOMAR DAS, (1912) I. L. R. 40 Cal. ... 140

**Review, Application for—Suit—Res judicata—Compromise decree.** An application for review is not a suit within the meaning of s. 13 of the Code of Civil Procedure, 1882, and a decision of a question arising in an application for review cannot operate as constructive *res judicata*: *Gulab Koer v. Badshah Bahadur*, 10 C. L.J. 420, referred to; *Ram Gopal Majumdar v. Prasanna Kumar Samad*, 2 C. L. J. 508 distinguished.

SRISH CHANDRA PAL CHOWDHRY v. TRIGUNA PRASAD PAL CHOWDHURY (1913), I. L. R. 40 Cal. ... 541

**Revision:** See SANCTION FOR PROSECUTION 239

**Revival of Proceeding:** See SANCTION FOR PROSECUTION ... 584

**Revocation:** See LETTERS OF ADMINISTRATION 50  
—See SANCTION FOR PROSECUTION 423

**Right of Appeal:** See APPEAL TO PRIVY COUNCIL ... 21

**Right of Private Defence:** See ASSESSORS, EXAMINATION OF ... 163

**"Ring" Game** See OSTENSIBLE MEANS OF SUBSISTENCE ... 702

**Rioting:** See ASSESSORS, EXAMINATION OF ... 163

—See CHARGE ... 163

—See CUMULATIVE SENTENCES ... 511

—See JURY, TRIAL BY ... 367

**Rules and Orders of High Court, Rule 426:**

See REVIEW ... 140

**Sale:** See MORTGAGE ... 534

—by Commissioner of Partition: See REVIEW ... 140

**Sale Certificate:** See ADVERSE POSSESSION 173

**Sale for arrears of revenue—Act XI of 1859 sections 53, 54—Purchase by mortgagee in execution of his mortgage decree of the mortgaged property—Subsequent arrears of revenue and sale for such arrears—Liability of purchaser in execution of decree of Civil Court—Rights of purchaser at sale for arrears of revenue.** Section 54 of Act XI of 1859 enacts that when a share of an estate is sold "the purchaser shall acquire the share subject to all incumbrances, and shall not acquire any rights which were not possessed by the previous owner." On 9th August 1886 a mortgage was granted in favour of the respondent over a certain share in 4 out of 71 villages. On 31st May he obtained a decree on his mortgage which was made absolute on 19th December 1899. He executed his decree and a sale took place on 19th March 1900, at which the respondent himself became the purchaser. On 28th March as instalment of Government revenue on the 71 villages fell into arrear, and the whole residuary share of 71 villages, including the four villages purchased by the respondent, was notified for sale. The respondent did not pay the revenue due, but on 23rd April he obtained a certificate confirming the sale of 19th March in execution of his decree. On 6th June 1900 the whole of the villages was sold for arrears of revenue and was purchased by the predecessor in title of the appellant. In a suit against the respondent for the share purchased at the execution sale:—*Held* by the Judicial Committee (reversing the decision of the High Court), that the sale in execution of the mortgage decree took effect from the actual date of the sale, and not from its confirmation, and, therefore, from 19th March 1900 the respondent by his purchase became the proprietor of the estate sold, and not merely the purchaser of such right, title and interest in it as the mortgagor might

**Sale for arrears of revenue—*conold.***

have had. He was, therefore, notwithstanding the provisions of section 54 of Act XI of 1859 (which in fact rather confirmed the view taken), not in a position to maintain as against himself, or as against third parties unconnected with mortgage transactions upon the property, the position that his mortgage still remained an incumbrance thereon. That incumbrance had become extinct by the mortgagee's overriding right when he became complete owner of the lands. To keep it alive, as the respondent sought to do, would introduce confusion into the mechanism of transfer and insecurity into the rights in immoveable property which were not warranted by the Act. **BHAWANI KUWAR v. MATHURA PRASAD SINGH**, (1912) I. L. R. 40 Cal. ... 89

**Sale in Execution of Decree: See APPEAL TO PRIVY COUNCIL ... 635**

**Sale of Goods—*Insolvency of purchaser before delivery—Vendor's right to refuse delivery—Official Assignee, duties and rights of—Election within reasonable time—Tender of cash before delivery—Presidency Towns Insolvency Act (III of 1900), ss. 52, 62, 64—Joint Hindu family, insolvency of member of—Infant partner—Contract Act (IX of 1872), s. 247.*** On the insolvency of the *karta* of a *mitakshara* Hindu family, a suit is not maintainable by the Official Assignee for damages for breach of a contract entered into by the firm, which was the joint business of the family. Under section 52 of the Presidency Towns Insolvency Act, the rights that passed to the Official Assignee were the rights the insolvent had under the contract as an insolvent: hence, it was the duty of the Official Assignee to declare his election to take up the contract within a reasonable time, and to tender cash before calling for delivery: *Ex parte Chalmers*, L. R. 8 Ch. App. 289, and *Morgan v. Bain*, I. L. R. 10 C. P. 15, followed. **GREY v. LAMOND WALKER** (1913), I. L. R. 40 Cal. ... 523

**Sanction for Prosecution—*Appeal, right of—Grant or refusal of sanction by a lower authority—Application to superior authority whether a matter of appeal or revision—Limitation of the period of such application—Criminal Procedure Code (Act V of 1898), s. 195 (6)—Limitation Act (IX of 1908), Sch. I, Art. 154.*** Sub-section (6) of s. 195 of the Criminal Procedure Code does not confer a right of appeal to the superior authority, but only invests the latter with powers by way of revision. *Hardeo Singh v. Humuman Dat Narain*, I. L. R. 26 All. 244, *Mathuswami Murali v. Veeni Chetti*, I. L. R. 30 Mad. 382, discussed and distinguished. *Hari Murali v. Keshab Chandra Manna*, 16 C. W. N. 903, *Mehdi Hasan v. Tota Ram*, I. L. R. 15 All. 61, approved. *Ram Charan Talukdar v. Taripulla*, I. L. R. 39 Cal. 774, referred to. Where the question arises with reference to Article 154 of the Limitation Act (IX of 1908), it has merely to be stated that there is a doubt as to whether an appeal lies or not in such a case in order to give the applicant the benefit of the longer period. The High Court accordingly directed the Sessions Judge to hear an application to revoke a sanction made to him after the expiry of a month from this date. *In re North. Ex parte Hasluck*, [1895] 2 Q. B. 264, *Gopal Lal Shahai v. Bahorni*, 15 C. L. J. 120, followed. **POCHAI METEN v. EMPEROR** (1912), I. L. R. 40 Cal. ... 239

*Application to District Judge under s. 195, cl. (6) of the Criminal Procedure Code (Act V of 1898)—Transfer of such application to a Subordinate Judge for disposal—Jurisdiction—Civil Courts Act (XII of 1887), ss. 21 (2), (4) and 22 (1)—Appeal.* An application made to a District Judge under s. 195, sub-s. (6) of the Criminal Procedure Code, against the order of a Munsif, cannot be transferred by the District Judge to a Subordinate Judge for disposal. *Ram Charan Chanda Taluk-*

## PAGE.

## PAGE.

**Sanction for Prosecution—concl'd.**

*dar v. Taripulla*, I. L. R. 39 Calc. 774, approved. *Semble*: An application under s. 195, sub-s. (6) of the Criminal Procedure Code is not an "appeal" within the meaning of s. 22, sub-s. (1) of the Bengal Civil Courts Act, 1887. *HARI MANDAL v. KESHAB CHANDRA MANA* (1912) I. L. R. 40 Calc. ... 37

*Criminal Procedure Code (Act V of 1898), s. 195—Verbal application—Jurisdiction—Revocation—Power of Court granting sanction—Practice.* Where a verbal application was made by counsel for sanction to prosecute under section 195 of the Criminal Procedure Code and granted by the Court, but no order could be drawn up as the application was not made upon formal petition: *Held*, that upon a formal petition being subsequently presented, the Court had jurisdiction to grant such sanction, the former sanction being inoperative. *Held*, further, that a Judge sitting on the Original Side has no jurisdiction to revoke a sanction previously granted by him, and that application for such revocation must be made to a Civil Appellate Bench of the Court. *Kāli Kinkar Sett v. Dinabandhu Nandy*, I. L. R. 32 Calc. 379, discussed. *THADDEUS v. JANAKI NATH SAHA* (1912), I. L. R. 40 Calc. ... 423

*Second sanction—Criminal Procedure Code (Act V of 1898), s. 195—Subsequent order, only a repetition of the first order—Revival of proceedings—Penal Code (Act XLV of 1860), ss. 193, 471—Limitation.* Where there are two orders purporting to grant sanction to the same prosecution, the later order will ordinarily be taken to be merely a repetition of the first, and the period of limitation will begin to run from the date of the first order. *Darbari Mandar v. Jagoo Lal*, I. L. R. 22 Calc. 573, referred to. *DURGA PROSAD PATHAK v. LACHMAN BANIA*, (1913) I. L. R. 40 Calc. ... 584

**Second Appeal:** See EXECUTION OF DECREE ... 45

**Second Sanction:** See SANCTION FOR PROSECUTION ... 584

**Secretary of State for India, suit against:** See JURISDICTION ... 308

See JURISDICTION OF CIVIL COURT ... 391

See NOTICE ... 503

See PUNITIVE POLICE ... 452

**Separate Sentences:** See CUMULATIVE SENTENCES ... 511

**Servient Tenement:** See EASEMENT ... 458

**Settlement Officer, order of:** See HIGH COURT, JURISDICTION OF ... 477

**Shebait—Alienation, power of—Dedicated property, acquisition of—Land Acquisition Act (I of 1894) s. 31, cl. (2)—Compensation—money, withdrawal of.** The position of a *shebait* is analogous to that of the manager of an infant. He is entitled to possess and to manage the dedicated property, but he has no power of alienation in the general character of his rights. S. 31 cl. (2) of the Land Acquisition Act applies to a *shebait*, since he is not competent to alienate the land. *Kamini Debi v. Promotho Nath Mookerjee*, 13 C. L. J. 597, followed. *RAMPRASANNA NANDI CHOWDHURI v. SECRETARY OF STATE FOR INDIA*, (1913) I. L. R. 40 Calc. ... 895

**Shebait, appointment of:** See RELIGIOUS TRUST ... 251

**Similarity of Names:** See TRADE-NAME ... 570

**Small Cause Case:** See APPEAL ... 537

**Son, liability of:** See MORTGAGE ... 342

**Special Leave to appeal to Privy Council:** See HIGH COURT, JURISDICTION OF ... 955

**Specific Performance—Agreement to renew a lease when specifically enforceable against a subsequent lessee for value—Duty of subsequent lessee to enquire of terms of previous lease—Specific Relief Act (I of 1877), s. 27.** An agreement to renew a lease under

	PAGE.		PAGE
<b>Specific Performance—<i>concl'd.</i></b>		<b>Suit—<i>concl'd.</i></b>	
certain conditions on the determination of the term of the lease can be specifically enforced against a subsequent lessee for value who has omitted to make an enquiry of the tenant in possession about the terms of the lease under which he was holding it. The occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights, and if he chooses to make no enquiry of the tenant, he cannot claim to be a transferee without notice. <i>BABURAM BAG v. MADHAB CHANDRA POLLAY</i> , (1913) I. L. R. 40 Calc. ... ..	565	105 of the Bengal Tenancy Act cannot be regarded as a suit: <i>Upadhyaya Thakur v. Persikh Singh</i> , I. L. R. 23 Calc. 723, referred to. Therefore, although an application under section 105 of the Bengal Tenancy Act was previously withdrawn without liberty to make a fresh application, a subsequent suit for enhancement of rent under s. 30(b) of the Act is maintainable; the provisions of either section 37 or 109 of the Act are not applicable to such a case. <i>CHONDITTI v. TULSI SINGH</i> (1912), I. L. R. 40 Calc. 428	428
<b>Specific Relief Act (1 of 1877), s. 27:</b> <i>See</i>		<b>Suits Valuation Act (VII of 1887), s. 8:</b> <i>See</i>	
<b>SPECIFIC PERFORMANCE</b> ... ..	565	COURT-FEE ... ..	615
----- <b>s. 42:</b> <i>See</i>		<b>Territorial Jurisdiction:</b> <i>See</i> DIVORCE ... ..	215
COURT-FEE ... ..	245	<b>Title:</b> <i>See</i> REVIEW ... ..	140
----- <b>s. 45:</b> <i>See</i>		<b>Tort:</b> <i>See</i> LIMITATION ... ..	898
MUNICIPAL CORPORATION ... ..	836	<b>Trade-mark—Licensor and Licensee—Estoppel—Evidence Act (I of 1872), s. 117—Licensee's right to question Licensor's title—Public Policy—Assignment of trade-mark denoting merely standard or quality of manufacture—Abandonment of trade-mark—Incoming Partner, liability of, for obligations of firm—Costs.</b> The licensee of a trade-mark is estopped as against his licensor from questioning the latter's title to the trade-mark. The fact that the licensee has repudiated his contract with his licensor cannot give him the right to question the licensor's title, for the latter's concurrence is necessary to rescind the contract. <i>Johnstone v. Milling</i> , 16 Q. B. D. 460, referred to. Where jute-trade-marks, bearing the name of the original proprietor of those marks, have come, by usage of trade, to indicate, not the skill in selecting jute of the original proprietor so as to make those marks personal to him, but merely a certain standard, kind, quality, or mode of manufacture of goods, irrespective of the person in whose hands the business might be, the assignment of such marks is not a fraud on the public or against public policy. A license for four out	
----- <b>ss. 45, 46:</b>			
<i>See</i> PLEADERSHIP EXAMINATION ... ..	588		
<b>Stamp-duty:</b> <i>See</i> ARBITRATION ... ..	219		
<b>Standard of Proof:</b> <i>See</i> LIMITATION ... ..	898		
<b>Statute Law:</b> <i>See</i> CRIMINAL REVISION ... ..	41		
<b>Stay of Execution:</b> <i>See</i> HIGH COURT, JURISDICTION OF ... ..	955		
<b>Steamer Company, liability of:</b> <i>See</i> CARRIERS ... ..	716		
<b>Stridhan:</b> <i>See</i> HINDU LAW ... ..	650		
----- HINDU LAW—STRIDHAN ... ..	82		
<b>Succession Act (X of 1865), ss. 105, 159:</b>			
<i>See</i> WILL ... ..	192		
----- <b>s. 111:</b> <i>See</i>			
HINDU LAW—WILL ... ..	274		
<b>Sudras:</b> <i>See</i> HINDU LAW—INHERITANCE ... ..	545		
<b>Suit:</b> <i>See</i> REVIEW, APPLICATION FOR ... ..	541		
<b>Suit—Bengal Tenancy Act (VIII of 1885) ss. 30(b), 37, 105, 107, 109—Whether an application under s. 105 of the Act, a suit—Withdrawal of an application under that section, effect of—Subsequent suit for enhancement of rent under s. 30(b), whether maintainable</b> An application under section			

	PAGE.		PAGE.
<b>Trade-mark—<i>contd.</i></b>		<b>Trade-mark—<i>concl'd.</i></b>	
of seven trade-marks, the remaining three having been abandoned, is valid. <i>British American Tobacco Co., Ltd. v. Mahboob Buksh</i> , I. L. R. 38 Cal. 110, distinguished. As the right to a trade-mark might be acquired so it might be abandoned, and no length of time is required for acquiring the right, or, apart from statutory law, to constitute an abandonment. <i>Lavergne v. Hooper</i> , I. L. R. 8 Mad. 149, approved. An agreement by an incoming partner to make himself liable to creditors of the firm before he joined it, may be established by indirect evidence, and the Courts lean in favour of such an agreement and are ready to infer it from slight circumstances. <i>Ex parte Jackson</i> , 1 Ves. Jun. 131, <i>Ex parte Peele</i> , 5 Ves. Jun. 602, and <i>Rolfe and the Bank of Australia v. Flower Salting &amp; Co.</i> , L. R. 1 P. C. 27, approved.		disclaimed the device except the name, and the former's son claimed the name as representing his own trade-mark in a separate business and the rest of the prosecution evidence did not establish the possession or use of any specific trade-mark: <i>Held</i> , that the complainant had not proved that he had a trade-mark, for the infringement of which a rival trader, using a similar device with the same name, could be convicted under ss. 482, 485 or 486 of the Penal Code, and that the case was of a civil nature. When a manufacturer has no exclusive right to manufacture a certain article or even articles of a particular brand, all that he can claim is that no other manufacturer should so mark such articles as to pass them off as the former's when they are not. <i>Semble</i> : The improper use of a trade-name may fall under s. 5 of the Merchandise Marks Act (IV of 1889), and he punishable under s. 6 or s. 7 as a false trade description.	
JAGARNATH & Co. v. CRESSWELL AND OTHERS (1913), I. L. R. 40 Cal. ... ..	814	ANATH NATH DEY v. EMPEROR (1912), I. L. R. 40 Cal. ... ..	281
—Using a false trade-mark—Possession of instruments for counterfeiting a trade-mark—Selling umbrellas with counterfeit trade-mark—Trade-name, use of, by rival manufacturer—Using a false trade description—Penal Code (Act XLV of 1860), ss. 482, 485 and 486—Merchandise Marks Act (IV of 1889), ss. 6 and 7. A trade-mark must be some visible and concrete device or design affixed to goods to indicate that they are the manufacture of the person whose property the trade-mark is. It must consist of a name impressed in some distinctive way. There is a distinction between a trade-mark and a trade-name: <i>Singer Manufacturing Co. v. Loog</i> , L. R. 8 A. C. 15, referred to. Where a tradesman alleged in his complaint to the Magistrate that his trade-mark consisted of a particular device, with the name " <i>Butto Kristo Pal</i> ," or " <i>Sri Butto Kristo Pal</i> ," said to be that of his son, but at the trial claimed only the name as the trade-mark, while one of the partners		Trade-name—Similarity of names of Insurance Companies—"Oriental"—Word known in business—Intention to deceive—Injury to plaintiff—Injunction—Provident Insurance Society—Provident Insurance Societies Act (V of 1912), ss. 5 and 6—Indian Life Assurance Companies Act (VI of 1912)—User. On an application by the plaintiff company, an old, large and well-known Insurance Company, registered in Bombay, and having a branch office in Calcutta, for a temporary injunction to restrain the defendant company, which was incorporated in Calcutta in November 1912, with a small share capital, but with the widest powers of doing life and other insurance business, though its present rules limited its life insurance business to the issue of policies for sums not exceeding Rs. 500, from using or carrying on business under the name it had	



**Trade-name—concl'd.**

adopted:—*Held*, that, inasmuch as the term "Oriental" had become identified with the plaintiff company, an injunction should issue restraining the defendant company from using the term "Oriental" in its name, as such user would be likely to deceive the public, and the defendant company would be a source of danger to, and would be liable to cause damage to, the plaintiff company. *Merchant Banking Company of London v. Merchants' Joint Stock Bank*, L. R. 9 Ch. D. 560, *Accident Insurance Company, Ltd. v. Accident, Disease and General Insurance Corporation, Ltd.*, 54 L. J. Ch. 104 and *Guardian Fire and Life Assurance Company v. Guardian and General Insurance Company, Ltd.*, 50 L. J. Ch. 253, referred to. The circumstance that the field of operation of the defendant company was in the Orient, did not entitle it to the use of the term "Oriental." *Hendricks v. Montagu*, L. R., 17 Ch. D. 638, followed. *Rugby Portland Cement Co., Ltd. v. Rugby and Newbold Portland Cement Co., Ltd.*, 8 R. P. C. 241; (C. A.) 9 R. P. C. 46, distinguished. *Semble*: An Insurance Company, incorporated under the Indian Companies Act, is not a Provident Insurance Society within the scope of the Provident Insurance Societies Act of 1912.

ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE Co., LD. v. ORIENTAL ASSURANCE Co., LD. (1913) 1. L. R. 40 Calc. ... 570

**Trade-name, use of:** See TRADE-MARK ... 281

**Transfer—Appeal—Powers of Court to whom case is transferred for trial—Limitation—Practice.** When an appeal has been transferred for trial by a District Judge to a Subordinate Judge, the Subordinate Judge has, for the purpose of disposing of the appeal, under the Bengal, North-Western Province and Assam Civil Courts Act, all the powers which could be exercised by the District Judge. Where, therefore, an

**Transfer—concl'd.**

appeal was presented to the District Judge after the period of limitation, owing to a mistake of law as regards the appealability of the suit, and the District Judge admitted the appeal under s. 5 of the Limitation Act and transferred the appeal to the Subordinate Judge for disposal, the Subordinate Judge has power to consider whether the appeal was competent or barred by limitation: *Jhotee Sahoo v. Omesh Chunder Sircar*, 1. L. R. 5 Calc. 1, not followed.

VISMADDEV DAS v. SITA NATH ROY (1912), 1. L. R. 40 Calc. ... 259

**Transfer of Application:** See SANCTION FOR PROSECUTION ... 37

**Transfer of Holding:** See LANDLORD AND TENANT ... 870

**Transfer of Property Act (IV of 1882), s. 43:** See ADVERSE POSSESSION ... 173

---

ss. 85, 90: See MORTGAGE ... 342

---

s. 106: See EJECTMENT ... 858

**Trespass:** See GRAVE-YARD ... 548

**Trust—Deed of trust, construction of—Uncertainty—Gift for "religious acts" (dharmakarmarthi) and for "religious purposes" (dharmoddeshi)—Works of public good—Discretion of trustee.** A settlor by a deed of trust in the Bengali language, after declaring that for religious acts (*dharmakarmarthi*), with a desire for the spiritual benefit of the deceased forefathers, and to please Vishnu, she made over the properties covered by the deed for religious purposes (*dharmoddeshi*), proceeded to direct that certain *Thakoor*s should be worshipped and maintained, and the annual *Durgotsab* performed out of the income of the trust estate, and further, by the sixth clause of the trust deed, provided that out of the income which should remain after incurring the expenses aforesaid a sum not exceeding one thousand rupees should be applied in supporting the poor, the blind, and

**Trust—concl'd.**

the destitute, and in imparting education, in *upanayan* (assumption of the sacred thread ceremony), in removing marriage difficulties (getting girls married), or in works of public good. It was to be paid at the discretion of the trustee towards dispensaries, hospitals, charitable societies, schools, or any students' education, feeding of the poor, etc., marriage, *upanayan*, etc., excavation and consecration of tanks, etc., in villages having a dearth of water, or in the construction and consecration of *ghāts* and *māths*. The trustee for the time being had under the deed discretion to render assistance beyond a thousand rupees, and had also full power to decide where or for whose education, *upanayan* or for whose daughter's marriage the same should be applied: *Held*, that such directions, as were contained in the sixth clause of the trust deed, were void and inoperative for vagueness and uncertainty. *Trikumlas Damodhar v. Haridas Morarji*, I. L. R. 31 Bom. 583; *Grimond (or Macintyre) v. Grimond*, [1905] A. C. 124; *Baj Chaulmbai v. Dady Nusserwanji Dady*, I. L. R. 26 Bom. 632; *Williams v. Kershaw*, 5 Cl. & F. 111; *Surbomungola Dabee v. Mohendromath Nath*, I. L. R. 4 Calc. 508; and *Runchordas Vandravandas v. Pravati-bai*, I. L. R. 23 Bom. 725; I. R. 26 I. A. 71, referred to.

SARAT CHANDRA GHOSE *v.* PRATAP CHANDRA GHOSE (1912), I. L. R. 40 Calc. ... 232

**Ultra vires—Bengal Tenancy Act (VIII of 1885), s. 101, cls. 2 (a) and 3—**"A large proportion of landlords," meaning of—Order passed by Local Government under section 101, cl. 2 (a) at the instance of landlords having large proportion of interest, effect of—Jurisdiction of Civil Court to question validity of the order, after issue of Notification under the section. The words "a large proportion of the landlords" in section 101, cl. 2 (a) of the Bengal Tenancy Act, mean

PAGE.

**Ultra vires—concl'd.**

a large proportion of the landlords as determined by the interests they hold in the estate. Where, therefore, an application was made by landlords having a large proportion of interest in an estate, to the Local Government for the issue of an order under the said section, and an order was accordingly issued by a Notification in the official Gazette. *Held*, that the order was not *ultra vires*. *Held*, further, that it was with the Local Government the discretion rested to determine whether the application was in due form under the provisions of section 101, cl. 2 (a) of the Act, and after the Local Government had decided that point and had issued the Notification, the jurisdiction of the Civil Court to interfere with the order was barred by clause 3 of the same section.

SECRETARY OF STATE FOR INDIA *v.* PURNENDU NARAYAN ROY (1912), I. L. R. 40 Calc. ... 123

**Uncertainty:** See RELIGIOUS TRUST ... 232

**Under-estimation of Value of Property:**  
See APPEAL TO PRIVY COUNCIL ... 635

**Under-raiyats:** See EJECTMENT ... 858

**User:** See TRADE-NAME ... 570

**Using false Trade-mark:** See TRADE-MARK 281

**Usufructuary Mortgage:** See INTEREST ... 514

\_\_\_\_\_, See LANDLORD AND  
TENANT ... 870

**Valuation of Suit:** See COURT-FEE ... 615

**Vendor and Purchaser:** See REVIEW ... 140

**Verbal Application:** See SANCTION FOR  
PROSECUTION ... 423

**Verbal Notice:** See EJECTMENT ... 858

**Verdict by Casting Lots:** See JURY, TRIAL  
BY ... 693

**Voluntariness:** See CONFESSION ... 873

**Voluntary Payment—Suit to recover money paid under decree—Wrongful interference of defendant—"Coercion"—Contract Act (IX of 1872), ss. 15, 69, 70, 72 Illus. (b)—Civil Procedure Code, 1882, s. 278 et seq.—Claims to attached property—Money paid under**

PAGE.

**Voluntary Payment—contd.**

*compulsion—Money paid under process of decree against third person.* The appellant (plaintiff) stated in his plaint that he was the proprietor of the Delhi Cotton Mills against which the respondent Bank (defendant) had an unsatisfied decree; that the respondent on 15th August 1902 applied for the attachment of the property and premises of the mills, wrongfully stating that they were the property of the Delhi Cotton Mills Company, attached the property on 20th August 1902, knowing that it belonged to the plaintiff, and dispossessed him; that "he has suffered considerable damage by the said acts of the defendant, and as he was by such acts practically ousted from all the machinery and mills, and could not work them, and the whole of such damage would be very considerable, and part of it most difficult to prove, and it was probable that by objection to such attachment under the Civil Procedure Code a considerable time would elapse before he could obtain an order setting aside the attachment," the plaintiff was compelled to pay the balance due to the defendant under the decree against the Delhi Cotton Mills Company, under protest, on 27th August 1902. In a suit brought for a return of the money so paid, and damages for the alleged illegal acts of the defendant, the defence, *inter alia*, was that "the suit as framed would not lie," and the case was argued on a preliminary issue, the proceedings being of the nature of a demurrer. *Held* (reversing the decision of the Courts in India), that the plaintiff was entitled to recover the money so paid as being an involuntary payment produced by coercion, namely, the wrongful interference of the defendant with his full and free enjoyment of his own property. *Dulichant v. Ram Kishan Singh*, I. L. R. 7 Cal. 648, L. R. 8 I. A. 93, followed. The fact that the sale was not inevitable in the present case was not relevant. The greater or less probability of a sale taking

**Voluntary Payment—concl.**

place did not affect the *ratio decidendi* in that case which is that the payment was made under the force of the execution proceedings, and that in India, as in England, such a payment is regarded by the law as being made under compulsion. The procedure provided in the Civil Procedure Code referring to claims to attached property (section 278 *et seq*) is merely permissive, being analogous to the procedure by interpleader in England. But the fact that such a procedure is open to him if he chooses to adopt it in no way interfered with the plaintiff's right to take any other lawful alternative. Section 72 of the Contract Act (IX of 1872) is not exhaustive. The meaning of the word "coercion" used in that section is not controlled by the definition in section 15; but is used in its general and ordinary sense. The definition in section 15 is expressly inserted for the special object of applying to section 14, *i.e.*, to define what is the criterion whether an agreement was made by means of a consent extorted by coercion, and does not control the interpretation of "coercion" when the word is used in other surroundings. Sections 69 and 70 of the Contract Act do not refer in any way to remedies against the wrongdoer, and are therefore irrelevant to the question raised in this appeal. *KANHAYA LAL v. NATIONAL BANK OF INDIA, LTD.*, (1913) I. L. R. 40 Cal. 598

**Waiver:** See NOTICE ... 533

**Wakf by Dedication or User:** See MAHOMEDAN LAW—ENDOWMENT ... 297

**Warrant:** See ATTACHMENT ... 849

**Wife, rights of:** See JEWISH LAW ... 266

**Will—Republication—Succession Act (X of 1865), ss. 105, 159—Codicil—Death of testator within one year—Repair of graves—Charitable bequest—Conditions: Election of deacons, Communion Service—Gift-over to another charity—Perpetuities.** The testator died on the 8th July 1909, leaving as next-of-kin a nephew and leaving a will dated the 14th April 1884 and

